SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 482

HARRY H. WEISS, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

J. HARRY WIENER

No. 483

C. F. ROUTZAHN, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

J. HARRY WIENER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1 [Caption omitted.]

J. H. WIENER
vs.
HARRY H. WEISS, AS COLLECTOR OF INTERNAL REVENUE OF the United States at Cleveland, Ohio } No. 12414

J. H. WEINER
vs.
C. F. ROUTZAHN, AS COLLECTOR OF INTERNAL REVENUE OF the United States at Cleveland, Ohio, also known as the Eighteenth District of Ohio } No. 12429

2 In United States District Court, Northern District of Ohio, Eastern Division

Amended petition

Filed Mar. 27, 1924 in case No. 12,414

The claimant in the above entitled cause respectfully represents to this honorable court as follows:

First. That the plaintiff made his return for income tax in the year 1919 for the calendar year ending on the 31st day of December, 1918, under the provisions of the income tax law of the revenue act of 1918. The plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute, and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net returns from his business amounted to seven thousand twenty-one and 86/100 dollars ($7,021.86), that the gross amount of rents received were sixty-eight thousand twenty and 03/100 dollars ($68,020.03), that the disbursements on said rent account totaled sixty-six thousand seventeen and 52/100 dollars ($66,017.52), leaving a balance of two thousand two and 51/100 dollars ($2,002.51), or a total net income of nine thousand twenty-four and 37/100 dollars ($9,024.37).

In said income tax return the plaintiff, by a mistake and inadvertence, failed to allow depreciation on buildings standing on lands which were held by the plaintiff under ninety-nine year leases, renewable forever. Thereafter the plaintiff made an amended return in which he claimed depreciation on buildings owned by plaintiff in the sum of twenty-one thousand six hundred fourteen and 41/100 dollars ($21,614.41) for the year 1918, and also one thousand seven hundred thirty-seven and 78/100 dollars ($1,737.78) as depreciation on buildings located on land held by the plaintiff under ninety-nine year leases, renewable forever, as follows: On No. 8 South Howard Street, on which there was a building costing twenty-five thousand dollars ($25,000.00) and having a life of approximately

ten years, he claimed a depreciation of one thousand forty-one and 67/100 dollars ($1,041.67), and upon a certain building located upon leasehold premises known as 79 South Main Street, having a value of twenty-five thousand dollars ($25,000.00), with buildings having a life of fifteen years, he claimed depreciation in the
3 amount of six hundred ninety-six and 11/100 dollars ($696.11), making a total of one thousand seven hundred thirty-seven and 78/100 dollars ($1,737.78).

Plaintiff alleges that under each of the leases for the term of ninety-nine years, renewable forever, covering the premises last mentioned, it was the duty of the plaintiff, by the covenants of said lease, at all times to keep the building upon said premises of value equal to at least the building upon said premises, which value was as above stated. Plaintiff therefore alleges that he, and not the owner of the fee simple of said premises, suffered the depreciation upon said buildings.

Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States of America allowed to the plaintiff a depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff the depreciation on buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated. Said Internal Revenue Service of the Treasury Department did, therefore, in its findings, dated the 11th day of April, 1923, find that the plaintiff was entitled to a refund of the sum of five hundred ninety-eight and 87/100 dollars ($598.87) from the tax which the plaintiff had theretofore paid to the defendant, Harry H. Weiss, in the year 1919 for said 1918 taxes in the sum of six hundred twenty-one and 65/100 dollars ($621.65), making the total tax assessable against the plaintiff for the year 1918 the sum of twenty-two and 78/100 dollars ($22.78). Plaintiff alleges that had he been allowed depreciation upon the buildings located on premises held by the plaintiff under ninety-nine year leases, renewable forever, as above stated, no tax would have been assessed against the plaintiff for the year 1918.

Second. That the plaintiff made his return for income tax in the year 1920 for the calendar year ending on the 31st day of December, 1919, under the provisions of the income tax law of the revenue act of 1918. The plaintiff endeavored to make his said return in strict accordance with the requirements of said statute and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net
4 returns from his business, including rentals, amounted to eleven thousand one hundred seventy-nine and 95/100 dollars ($11,179.95) and that he received income from salaries and wages amounting to five thousand two hundred dollars ($5,200.00), making a total net income of sixteen thousand three hundred seventy-nine and 95/100 dollars ($16,379.95), from which was deductible taxes paid, amounting to one thousand dollars ($1,000.00), leaving a bal-

ance of fifteen thousand three hundred seventy-nine and 95/100 dollars ($15,379.95) as a total net income.

In said income tax return the plaintiff, by a mistake and inadvertence, failed to allow depreciation upon buildings standing on land owned by the plaintiff in fee or upon lands which were held by the plaintiff under ninety-nine year leases, renewable forever. Thereafter, plaintiff filed an amended return in which he claimed depreciation on buildings owned by plaintiff in fee in the sum of twenty-one thousand four hundred thirty-five and 11/100 dollars ($21,435.11), and nine thousand one hundred forty and 07/100 dollars ($9,140.07) as depreciation on buildings located on land held by the plaintiff under ninety-nine year leases, renewable forever, as follows, all of said buildings being located in the city of Akron, Ohio:

Buildings	Bldg. cost	Life	Bldgs. on 99-year leases held jointly (depreciation)	Bldgs. on 99-year leases (depreciation)
216 S. Main St.	$25,000.00	15 yrs.		1,111.11
48 Howard St.	20,000.00	30 yrs.		2,500.00
218 S. Main St.	25,000.00	15 yrs.		1,666.67
42 S. Howard St.	18,900.00	15 yrs.		630.00
Wiener & Freiberg leases as follows: 376 E. Market St.	15,000.00	30 yrs.	873.00	
	5,000.00	12 yrs.	208.23	
382 E. Market St.	10,000.00	6 yrs.	833.34	
102 S. Main St.	80,000.00	20 yrs.	4,450.00	
			6,464.59	
			3,252.29	3,252.29
				9,140.07

5 Plaintiff alleges that under each of the leases for the term of ninety-nine years, renewable forever, covering the premises last mentioned, it was the duty of the plaintiff, by the covenants of said leases, at all times to keep the building on said premises of value equal to at least the building on said premises, which value was as above stated. Plaintiff therefore alleges that he, and not the owner of the fee simple of the premises, suffered the depreciation upon said buildings.

Plaintiff alleges that on the original return for the calendar year 1919 he paid to the defendant, Harry H. Weiss, income taxes in the sum of eight hundred sixty-two and 40/100 dollars ($862.40), and thereafter on the 7th day of December, 1921, he paid to the defendant, Harry H. Weiss, an additional assessment on the original return for the calendar year 1919 in the sum of three hundred seventy-two and 80/100 dollars ($372.80) tax, and penalty in the sum of eighteen and 64/100 dollars ($18.64), making total tax and penalty of three hundred ninety-one and 44/100 dollars ($391.44), which amount, together with the original payment of eight hundred sixty-two and 40/100 dollars ($862.40), amounted to one thousand two hundred fifty-three and 84/100 dollars ($1,253.84).

Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States allowed to the plaintiff depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff the depreciation on buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated. Said Internal Revenue Service of the Treasury Department did therefore in its findings, dated the 11th day of April, 1923, find that the plaintiff was to be assessed an additional tax on one thousand twenty-four and 70/100 dollars ($1,024.70), which tax did not take into account the amount of three hundred seventy-two and 80/100 dollars ($372.80) theretofore paid by the plaintiff to the defendant, Harry H. Weiss, on the 7th day of December, 1921, as aforesaid. The method by which this tax was adjusted is hereinafter stated in paragraph fourth.

6 Plaintiff alleges that had he been allowed depreciation upon the buildings located on the premises held by plaintiff under said ninety-nine year leases, renewable forever, as above stated, that the sum of six hundred four dollars ($604.00) only would have been assessed against the plaintiff for income tax, instead of the amount above set fourth, and that by reason thereof the plaintiff would be entitled to credit on said tax accordingly as set forth in paragraph fourth of this amended petition.

Third. That the plaintiff made his return for income tax in the year 1921 for the calendar year ending on the 31st day of December, 1920, under the provisions of the Income Tax Law of the Revenue Act of 1918; that plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net returns from his business, including automobile business and real estate, was twenty-nine thousand ninety-seven and 57/100 dollars ($29,097.57); that his repairs, wear and tear, obsolescence, depreciation and property losses on said buildings amounted to fifty-one thousand six hundred ninety-nine and 88/100 dollars ($51,699.88), leaving a net loss from business of twenty-one thousand five hundred ninety-two and 41/100 dollars ($21,592.41); that he had received income from salaries in the sum of five thousand two hundred dollars ($5,200.00), leaving net loss for the calendar year 1920 of sixteen thousand three hundred ninety-two and 41/100 dollars ($16,392.41).

In said income tax return the plaintiff claimed depreciation on buildings standing on lands owned by the plaintiff in fee and upon lands which were held by the plaintiff under ninety-nine year leases, renewable forever. The Department of Internal Revenue of the Treasury Department allowed to the plaintiff as depreciation on buildings owned by the plaintiff in fee simple the sum of twenty-four thousand seven hundred one and 27/100 dollars ($24,701.27), but refused to allow to the plaintiff depreciation on said buildings located

on premises held by the plaintiff under ninety-nine year leases, renewable forever. The following is a schedule of the amounts of depreciation claimed by the plaintiff on buildings located on premises held by the plaintiff under leases for the period of ninety-nine years, renewable forever:

7 Buildings	Bldg. cost	Life	Bldgs. on 99-year leases held jointly (depreciation)	Bldgs. on 99-year leases (depreciation)
48 Howard St.	25,000.00	10 yrs.		2,500.00
78 S. Main St.	25,000.00	15 yrs.		1,666.67
74 S. Main St.	25,000.00	15 yrs.		1,666.67
48 Howard St.	18,900.00	15 yrs.		1,260.00
69 S. Main St.	28,000.00	25 yrs.		1,120.00
69 S. Main St.	12,700.00	15 yrs.		846.67
69 S. Main St.	7,700.00	10 yrs.		770.00
69 S. Main St.	250.00	5 yrs.		50.00
69 S. Main St.	1,500.00	10 yrs.		150.00
69 S. Main St.	2,500.00	15 yrs.		166.67
69 S. Main St.	12,000.00	33 yrs.		360.00
3-4 Voris St.	3,500.00	15 yrs.		233.45
2 Voris St.	3,500.00	15 yrs.		233.45
11 Voris St.	6,000.00	2 yrs.		3,000.00
64 S. Main St.	45,000.00	25 yrs.		1,800.00
67 S. Main St.	500.00	5 yrs.		100.00
67 S. Main St.	500.00	5 yrs.		100.00
67 S. Main St.	500.00	5 yrs.		100.00
Barberton, Ohio	34,375.00	25 yrs.		1,031.25
36 High St.	70,000.00	15 yrs.		3,111.11
Wiener & Freiberg leaseholds as follows: 378 E. Market St.	85,000.00	18 yrs.	1,940.00	
	5,000.00	12 yrs.	416.50	
382 E. Market St.	10,000.00	8 yrs.	1,250.00	
382 E. Market St.	89,000.00	20 yrs.	4,450.00	
64 S. Howard St.	14,000.00	20 yrs.	583.33	
			8,645.83	
			4,322.91	4,322.91
				24,588.85

All of the buildings above mentioned are situated upon leasehold premises in the city of Akron, county of Summit, and State of Ohio, with the exception of one building, which is above designated in the foregoing table as "Barberton, Ohio."

Plaintiff alleges that had the Internal Revenue Service of the Treasury Department allowed to the plaintiff the depreciation
8 on said buildings in the amount of twenty-four thousand five hundred eighty-eight and 85/100 dollars ($24,588.85), as above stated, the plaintiff would have had no tax assessed against him as set forth under paragraph fourth hereafter for the calendar year of 1920.

Plaintiff alleges that he was entitled to deduct depreciation for said buildings located on said leased premises under leases which are above stated, all of which were leases for the period of ninety-nine years, renewable forever, and under each of said leases the plaintiff was required and it was his duty, by virtue of the covenants in each of said leases, at all times to keep the buildings equal to at least the value of the buildings which were located on said premises at the time the said leases were made, which value was as stated in the

foregoing table. Plaintiff alleges that he, and not the owner in fee simple of said premises, suffered the depreciation upon the buildings located upon said leased premises. Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States of America allowed to the plaintiff depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff depreciation upon buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated.

Fourth. Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States did find under the facts above set forth that the plaintiff had been overassessed for the year 1918 the sum of five hundred ninety-eight and 87/100 dollars ($598.87), but that for the year 1919 was subject to an additional tax in the amount of one thousand twenty-four and 70/100 dollars ($1,024.70), and for the year 1920 an additional tax of three hundred fifty-six and 06/100 dollars ($356.06), making total additional taxes for the years 1919 and 1920 of one thousand three hundred eighty and 76/100 dollars ($1,380.76). Deducting from said additional tax the overassessment of 1918 of five hundred ninety-eight and 87/100 dollars ($598.87) left a net additional tax of seven hundred eighty-one and 89/100 dollars ($781.89). Thereafter the Internal Revenue Service of the Treasury Department allowed to the plaintiff as a credit the amount which he had
9 paid as aforesaid under paragraph second of this amended petition, on the 7th day of December, 1921, in the sum of three hundred seventy-two and 80/100 dollars ($372.80), but C. F. Routzahn, who was then the duly appointed, acting, and qualified collector of internal revenue at Cleveland, Ohio, did demand payment from the plaintiff of the sum of four hundred nine and 09/100 dollars ($409.09) as the balance of said additional tax so assessed, remaining.

Fifth. Thereupon, following the report of the Internal Revenue Service of the Treasury Department, bearing date the 11th day of April, 1923, but mailed at Cleveland, Ohio, on the 16th day of April, 1923, the plaintiff did thereupon duly file his appeal in the office of the Commissioner of Internal Revenue in the Treasury Department in Washington, D. C., and thereafter a conference was duly held concerning the additional tax liability claimed by the Commissioner of Internal Revenue from the plaintiff as set forth in the last preceding paragraph, and concerning the amount claimed by the plaintiff which should be refunded to the plaintiff. Thereafter, namely, on the 13th day of July, 1923, the Income Tax Unit having heard the said appeal, did render its decision through the Commissioner of Internal Revenue concerning the income tax returns of the plaintiff for the years 1918 to 1920, inclusive, and with especial reference to the said report of the internal revenue agent in

charge of Cleveland, Ohio, dated the 11th day of April, 1923, and mailed the 16th day of April, 1923, and referred to in the decision of the Commissioner of Internal Revenue as dated April 4th, 1923. In said decision of July 13th, 1923, the said Commissioner of Internal Revenue did find that, as stated in the last preceding paragraph, there was claimed to be due from the plaintiff as additional income tax, based on the income tax returns of plaintiff for the years 1918, 1919, and 1920, in the sum of four hundred nine and 09/100 dollars ($409.09), as shown in the statement below:

1918	Over-assessment		598.87
1919	Additional tax	651.90	
1920	Additional tax	356.06	
		1,007.96	598.87
	Net additional tax		409.09

10 In said decision the Income Tax Unit did further state that the claim of the plaintiff to deduct depreciation on buildings located on premises held by plaintiff under ninety-nine year leases was rejected. Thereupon, the plaintiff, on the 8th day of August, 1923, did file his appeal from the decision of the Income Tax Unit in the offices of the Commissioner of Internal Revenue, Treasury Department, and thereupon the Commissioner of Internal Revenue did set the said appeal for hearing on the 29th day of August, 1923. On the 29th day of August, 1923, the said appeal was heard before the committee on appeals in the Treasury Department at Washington, D. C., and said committee and the said Commissioner of Internal Revenue, after hearing said appeal, did sustain the Income Tax Unit in its decision and did find that the plaintiff was not entitled to deduct from his income depreciation on buildings located on premises held by the plaintiff under ninety-nine year leases, renewable forever.

Sixth. Plaintiff alleges that he paid to the said C. F. Routzahn, as said collector, the sum of four hundred nine and 09/100 dollars ($409.09) on the 12th day of January, 1924, which amount, however, plaintiff paid to said C. F. Routzahn under protest. Plaintiff alleges that he paid said amount of four hundred nine and 09/100 dollars ($409.09) to the said C. F. Routzahn, as said collector, under duress and compulsion and in an involuntary manner, and by reason solely of the fact that the said C. F. Routzahn, as collector, threatened that he would proceed against the property of the plaintiff unless the plaintiff paid to the said C. F. Routzahn, as collector, the sum of four hundred nine and 09/100 dollars ($409.09), as above set forth.

Seventh. At the same time that the said plaintiff paid the sum of four hundred and 09/100 dollars ($409.09), he filed two claims for abatement of tax assessed with said C. F. Routzahn, as collector, one for the year 1919, in which claim for abatement plaintiff claimed that he had paid taxes for the year 1919 in the amount of one thousand two hundred thirty-five and 20/100 dollars; that there was

due for the year 1919 only the sum of six hundred four dollars ($604.00), which would leave a balance due plaintiff of six hundred thirty-one and 20/100 dollars ($631.20) for the year 1920.

11 The claim for abatement for the year 1920 set forth that plaintiff owed no tax liability for that year and denied the claim of the Commissioner of Internal Revenue for the additional tax for the year 1920 of three hundred fifty-six and 06/100 dollars ($356.06); that after an examination of said claim for abatement, the Commissioner of Internal Revenue rejected the same.

Eighth. That subsequently, on the 9th day of February, 1924, the plaintiff filed with said C. F. Routzahn, collector, three claims for refund of taxes illegally collected—one for the year 1918, in which he made claim for the entire amount of six hundred twenty-one and 65/100 dollars ($621.65), paid as income tax in the year 1918, one for the sum of six hundred thirty-one and 20/100 dollars ($631.20), which is the sum paid by plaintiff in excess of the sum of six hundred four dollars ($604.00), which, as the plaintiff claims, is his tax liability for the year 1919, and one for the refund of three hundred fifty-six and 06/100 dollars ($356.06), which is a part of the four hundred nine and 09/100 dollars ($409.09), paid to the said C. F. Routzahn as collector, on the 12th day of January, 1924.

Ninth. That after consideration of said claim for refund the Commissioner of Internal Revenue of the United States rejected said claim and the said C. F. Routzahn was instructed to notify the said plaintiff of the rejection of said claim.

Tenth. Plaintiff therefore claims from the defendant, Harry H. Weiss, as collector, the sum of six hundred thirty-one and 20/100 dollars ($631.20), as amount of overpayment as aforesaid made by plaintiff to the defendant, Harry H. Weiss, collector, in the year 1919, making the total amount from said Harry H. Weiss of one thousand two hundred fifty-two and 85/100 dollars ($1,252.85).

Wherefore, plaintiff prays judgment against the defendant, Harry H. Weiss, collector, in the sum of one thousand two hundred fifty-two and 85/100 dollars ($1,252.85), as aforesaid; the plaintiff further averring that he has always been the sole owner of the claims hereinbefore referred to and has not assigned nor transferred the whole or any part thereof, or any interest therein, and that he has at all times borne allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or

12 given encouragement to rebellion against the said Government; and that he believes the matters as stated herein to be true, and that he is justly entitled to the said amount from the United States, after allowing all its just debts and offsets.

J. H. WIENER,
By COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
Attorneys.

[*Duly sworn to by J. H. Wiener; jurat omitted in printing.*]

In United States District Court

Precipe for summons

Filed March 27, 1924

To the Clerk:

Issue summons in the above-entitled action for the defendant, Harry H. Weiss, as collector of internal revenue, at Cleveland, Ohio, to be marshalled for the Northern District of Ohio, Eastern Division of the United States District Court, returnable according to law.

Endorse thereon: "Claim for money, amount claimed against said Harry H. Weiss, collector, one thousand two hundred fifty-two and 85/100 dollars ($1,252.85)."

COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
Attorneys for Plaintiff.

13 In United States District Court

Waiver of trial to jury

Filed Nov. 12, 1926, in case No. 12414

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
Attorneys for Plaintiff.
A. E. BERNSTEEN, *Attorney for Defendant.*

In United States District Court

Answer to amended petition

Filed Dec. 7, 1926, in case No. 12414

Now comes A. E. Bernsteen, United States Attorney for the Northern District of Ohio, and files this answer on behalf of Harry Weiss, and says:

1. Defendant admits that the plaintiff filed his income tax return in the year 1919 for the calendar year ending December 31, 1918, and admits that the plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute. Defendant admits that the plaintiff failed to claim depreciation on buildings standing on lands which were held by plaintiff under 99-year leases, which were renewable forever. Defendant admits that the Commissioner of Internal Revenue allowed the plaintiff depreciation upon buildings owned by plaintiff in fee simple when plaintiff had a capital investment in said buildings, but refused to allow to plaintiff depreciation on buildings located on premises leased by the plaintiff under leases for 99 years renewable forever, except to the extent that

plaintiff had a capital investment in said leases. Defendant denies each and every allegation in paragraph "first" not expressly herein admitted.

14 2. Defendant admits that the plaintiff made a return for the income tax in the year 1920 for the calendar year ending December 31, 1919. Defendant admits that the plaintiff did not take depreciation in the said return upon buildings standing upon lands which were held by the plaintiff under 99-year leases renewable forever. Defendant further admits that the Commissioner of Internal Revenue allowed to the plaintiff depreciation upon the buildings owned by the plaintiff in fee simple to the extent of his capital investment therein, but refused to allow to the plaintiff depreciation upon buildings located upon premises leased by the plaintiff under leases for a period of 99 years renewable forever, except to the extent of plaintiff's capital investment therein. Defendant denies each and every allegation in paragraph "second" not herein expressly admitted.

3. Defendant admits that the plaintiff made a return for income tax in the year 1921 for the calendar year ending December 31, 1920. Defendant admits that in said return the plaintiff claimed depreciation upon buildings standing on lands owned by the plaintiff in fee and on lands which were held by the plaintiff under 99-year leases renewable forever. This defendant admits that the Commissioner of Internal Revenue allowed the plaintiff depreciation on buildings owned by the plaintiff in fee simple on his capital investment therein, but refused to allow to the plaintiff depreciation on buildings located on premises held by the plaintiff under leases for a period of 99 years, renewable forever, except to the extent of plaintiff's capital investment therein. This defendant denies each and every allegation in paragraph "third" not herein expressly admitted to be true.

4. This defendant admits the allegations of paragraph "fourth."

5. This defendant admits the allegations of paragraph "fifth."

6. Answering paragraph 6, this defendant admits plaintiff paid to C. F. Routzahn as collector the sum of four hundred nine dollars and nine cents ($409.09) under protest. This defendant denies each and every allegation in paragraph "sixth" not herein expressly admitted.

7. This defendant admits the allegations of paragraph "seventh."

15 8. This defendant admits the allegations of paragraph "eighth."

9. This defendant admits the allegations of paragraph "ninth."

10. This defendant denies each and every allegation in paragraph "tenth."

Wherefore this answering defendant prays that the action instituted against him by the plaintiff may be dismissed and that the plaintiff pay the costs herein.

A. E. BERNSTEIN,
United States Attorney.

[*Duly sworn to by A. E. Bernstein; jurat omitted in printing.*]

In United States District Court

Stipulation re filing of answer

Filed Jan. 5, 1927, in case No. 12,414

It is hereby stipulated that the answer in the above-entitled case may be filed as of the 7th day of December, A. D. 1926.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

16 In United States District Court

Order granting leave to file answer to amended petition as of Dec. 7, 1926

Entered Jan. 5, 1927, case No. 12,414

On application of defendant and consent of plaintiff, leave is hereby given defendant to file his answer to amended petition as of December 7, 1926, and said answer to amended petition is accordingly filed as of December 7, 1926.

In United States District Court

Judgment for defendant

Jan. 8, 1927, case No. 12,414

This matter came on to be heard before the court, the attorneys for the plaintiff and attorneys for defendant having waived in writing trial by jury herein and having consented that this cause be heard and determined by the court without the intervention of a jury, on the pleadings and agreed statement of facts which was heretofore filed in this cause.

Upon consideration thereof, the court finds upon said issues joined for the defendant and against plaintiff, to which ruling of court the plaintiff, by his attorneys, excepts.

It is, therefore, considered and adjudged by the court that the said defendant recover of plaintiff his costs herein expended taxed at ——— and that the plaintiff pay his own costs.

17 In United States District Court

Motion for new trial

Filed Jan. 8, 1927, in case No. 12,414

Now comes plaintiff by his attorneys and respectfully moves the court for a new trial in the within action, for the reasons hereinafter set forth in the attached brief.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

In United States District Court

Order overruling motion for new trial

Jan. 8, 1927, case No. 12,414

This day this cause came on to be heard upon motion of the plaintiff for a new trial and was submitted to the court. Upon consideration thereof, the court overrules said motion, to which ruling of the court plaintiff, by his attorneys, excepts.

It is further ordered by the court that the plaintiff have fifty (50) days in which to prepare, settle and file his bill of exceptions in accord with general rule 38.

18 In United States District Court

Petition

Filed March 27, 1924, in case No. 12,429

The claimant in the above entitled cause respectfully represents to this honorable court as follows:

First. That the plaintiff made his return for income tax in the year 1919 for the calendar year ending on the 31st day of December, 1918, under the provisions of the income tax law of the revenue act of 1918. The plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute, and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net returns from his business amounted to seven thousand twenty-one and 86/100 dollars ($7,021.86), that the gross amount of rents received were sixty-eight thousand twenty and 03/100 dollars ($68,020.03), that the disbursements on said rent account totaled sixty-six thousand seventeen and 52/100 dollars ($66,017.52), leaving a balance of two thousand two and 51/100 dollars ($2,002.51), or a total net income of nine thousand twenty-four and 37/100 dollars ($9,024.37).

In said income tax return the plaintiff, by a mistake and inadvertence, failed to allow depreciation on buildings standing on lands which were held by the plaintiff under ninety-nine year leases, renewable forever. Thereafter the plaintiff made an amended return in which he claimed depreciation on buildings owned by plaintiff in the sum of twenty-one thousand six hundred fourteen and 41/100 dollars ($21,614.41) for the year 1918, and also one thousand seven hundred thirty-seven and 78/100 dollars ($1,737.78) as depreciation on buildings located on land held by the plaintiff under ninety-nine year leases, renewable forever, as follows: On No. 8 South Howard Street, on which there was a building costing twenty-five thousand dollars ($25,000.00) and having a life of approximately ten years, he claimed a depreciation of one thousand forty-one 67/100 dollars

($1,041.67), and upon a certain building located upon leasehold premises known as 79 South Main Street, having a value of twenty-five thousand dollars ($25,000.00), with buildings having a life of fifteen years, he claimed depreciation in the amount of six hundred ninety-six and 11/100 dollars ($696.11), making a total
19 of one thousand seven hundred thirty-seven and 78/100 dollars ($1,737.78).

Plaintiff alleges that under each of the leases for the term of ninety-nine years, renewable forever, covering the premises last mentioned, it was the duty of the plaintiff, by the covenants of said lease, at all times to keep the building upon said premises of value equal to at least the building upon said premises, which value was as above stated. Plaintiff therefore alleges that he, and not the owner of the fee simple of said premises, suffered the depreciation upon said buildings.

Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States of America allowed to the plaintiff a depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff the depreciation on buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated. Said Internal Revenue Service of the Treasury Department did, therefore, in its findings, dated the 11th day of April, 1923, find that the plaintiff was entitled to a refund of the sum of five hundred ninety-eight and 87/100 dollars ($598.87) from the tax which the plaintiff had theretofore paid to Harry H. Weiss, who was then the duly appointed, acting, and qualified collector of internal revenue at Cleveland, Ohio, in the year 1919 for said 1918 taxes in the sum of six hundred twenty-one and 65/100 dollars ($621.65), making the total tax assessable against the plaintiff for the year 1918 the sum of twenty-two and 78/100 dollars ($22.78). Plaintiff alleges that had he been allowed depreciation upon the buildings located on premises held by the plaintiff under ninety-nine year leases, renewable forever, as above stated, no tax would have been assessed against the plaintiff for the year 1918.

Second. That the plaintiff made his return for income tax in the year 1920 for the calendar year ending on the 31st day of December, 1919, under the provisions of the income tax law of the revenue act of 1918. The plaintiff endeavored to make his said return in strict accordance with the requirements of said statute and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net
20 returns from his business, including rentals, amounted to eleven thousand one hundred seventy-nine and 95/100 dollars ($11,179.95) and that he received income from salaries and wages amounting to five thousand two hundred dollars ($5,200.00), making a total net income of sixteen thousand three hundred seventy-nine and 95/100 dollars ($16,379.95), from which was deductible taxes

paid, amounting to one thousand dollars ($1,000.00), leaving a balance of fifteen thousand three hundred seventy-nine and 95/100 dollars ($15,379.95) as a total net income.

In said income tax return the plaintiff, by a mistake and inadvertence, failed to allow depreciation upon buildings standing on lands owned by the plaintiff in fee or upon lands which were held by the plaintiff under ninety-nine year leases, renewable forever. Thereafter, plaintiff filed an amended return in which he claimed depreciation on buildings owned by plaintiff in fee in the sum of twenty-one thousand four hundred thirty-five and 11/100 dollars ($21,435.11), and nine thousand one hundred forty and 07/100 dollars ($9,140.07) as depreciation on buildings located on land held by the plaintiff under ninety-nine year leases, renewable forever, as follows, all of said buildings being located in the city of Akron, Ohio:

Buildings	Bldg. cost	Life	Bldgs. on 99-year leases held jointly (depreciation)	Bldgs. on 99-year leases (depreciation)
77 S. Main St.	$25,000.00	15 yrs.	--	1,111.11
8 S. Howard St.	35,000.00	30 yrs.		2,500.00
79 S. Main St.	25,000.00	15 yrs.		1,666.67
42 S. Howard St.	18,000.00	15 yrs.		936.00
Wiener & Freiberg leases as follows: 376 E. Market St.	35,000.00	19 yrs.	973.68	
	5,000.00	12 yrs.	208.33	
380 E. Market St.	10,000.00	8 yrs.	833.34	
102 S. Main St.	80,000.00	20 yrs.	4,456.00	
			6,464.59	
			3,252.29	3,252.29
				9,140.07

Plaintiff alleges that under each of the leases for the term
21 of ninety-nine years, renewable forever, covering the premises last mentioned, it was the duty of the plaintiff, by the covenants of said leases, at all times to keep the building on said premises of value equal to at least the building on said premises, which value was as above stated. Plaintiff therefore alleges that he, and not the owner of the fee simple of the premises, suffered the depreciation upon said buildings.

Plaintiff alleges that on the original return for the calendar year 1919 he paid to the said Harry H. Weiss as such collector, income taxes in the sum of eight hundred sixty-two and 40/100 dollars ($862.40), and thereafter on the 7th day of December, 1921, he paid to the said Harry H. Weiss as collector, an additional assessment on the original return for the calendar year 1919 in the sum of three hundred seventy-two and 80/100 dollars ($372.80) tax, and penalty in the sum of eighteen and 64/100 dollars ($18.64), making a total tax and penalty of three hundred and ninety-one and 44/100 dollars ($391.44), which amount, together with the original payment of eight hundred sixty-two and 40/100 dollars ($862.40),

amounted to one thousand two hundred fifty-three and 84/100 dollars ($1,253.84).

Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States allowed to the plaintiff depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff the depreciation on buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated. Said Internal Revenue Service of the Treasury Department did therefore in its findings, dated the 11th day of April, 1923, find that the plaintiff was to be assessed an additional tax of one thousand twenty-four and 70/100 dollars ($1,024.70), which tax did not take into account the amount of three hundred seventy-two and 80/100 dollars ($372.80) theretofore paid by the plaintiff to the said Harry H. Weiss, as collector, on the 7th day of December, 1921, as aforesaid. The method by which this tax was adjusted is hereinafter stated in paragraph fourth.

Plaintiff alleges that had he been allowed depreciation upon the buildings located on the premises held by plaintiff under said ninety-nine year leases renewable forever as above stated, that the sum of six hundred four dollars ($604.00) only would have been assessed against the plaintiff for income tax, instead of the amount above set forth, and that by reason thereof the plaintiff would be entitled to credit on said tax accordingly as set forth in paragraph fourth of this petition.

Third. That the plaintiff made his returns for income tax in the year 1921 for the calendar year ending on the 31st day of December, 1920, under the provisions of the income tax law of the revenue act of 1918; that plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute and has made true statements of his net income in the manner provided in said statute for said year. In said return the plaintiff stated that the net returns from his business, including automobile business and real estate, was twenty-nine thousand ninety-seven and 57/100 dollars ($29,097.57); that his repairs, wear and tear, obsolescence, depreciation, and property losses on said buildings amounted to fifty-one thousand six hundred ninety-nine and 88/100 dollars ($51,699.88), leaving a net loss from business of twenty-one thousand five hundred ninety-two and 41/100 dollars ($21,592.41); that he had received income from salaries in the sum of five thousand two hundred dollars ($5,200.00), leaving net loss for the calendar year 1920 of sixteen thousand three hundred ninety-two and 41/100 dollars ($16,392.41).

In said income-tax return the plaintiff claimed depreciation on buildings standing on lands owned by the plaintiff in fee and upon lands which were held by the plaintiff under ninety-nine year leases, renewable forever. The Department of Internal Revenue of the Treasury Department allowed to the plaintiff as depreciation on

buildings owned by the plaintiff in fee simple the sum of twenty-four thousand seven hundred one and 27/100 dollars ($24,701.27), but refused to allow to the plaintiff depreciation on said buildings located on premises held by the plaintiff under ninety-nine year leases, renewable forever. The following is a schedule of the amounts of depreciation claimed by the plaintiff on buildings located on premises held by the plaintiff under leases for the period of ninety-nine years, renewable forever.

25 Buildings	Bldg. cost	Life	Bldgs. on 99-year leases held jointly (Depreciation)	Bldgs. on 99-year leases (Depreciation)
8 S. Howard St	25,000 00	10 yrs		2,500 00
70 S. Main St	25,000 00	15 yrs		1,666 67
77 S. Main St	25,000 00	15 yrs		1,666 67
42 S. Howard St	18,000 00	15 yrs		1,200 00
810 S. Main St	28,000 00	25 yrs		1,120 00
819 S. Main St	12,000 00	15 yrs		800 00
819 S. Main St	7,000 00	10 yrs		700 00
819 S. Main St	2,500 00	5 yrs		500 00
819 S. Main St	1,500 00	10 yrs		150 00
819 S. Main St	2,500 00	15 yrs		166 67
20-3 Voris St	12,000 00	33 yrs		363 63
19 Voris St	5,000 00	15 yrs		333 33
17 Voris St	5,000 00	15 yrs		333 33
614 S. Main St	5,000 00	5 yrs		1,000 00
479 S. Main St	85,000 00	20 yrs		4,250 00
479 S. Main St	1,000 00	5 yrs		200 00
479 S. Main St	500 00	5 yrs		100 00
479 S. Main St	500 00	5 yrs		100 00
Barberton, Ohio	34,875 00	20 yrs		1,743 75
20 High St	70,000 00	15 yrs		4,666 67
26 over 4 Freiberg leaseholds as follows: 178 E. Market St	35,000 00	18 yrs	1,940 00	3,111 11
	3,000 00	12 yrs	816 30	
282 E. Market St	15,000 00	5 yrs	3,302 30	20,264 94
192 E. Market St	80,000 00	20 yrs	1,276 00	
69 S. Howard St	18,000 00	20 yrs	4,446 00	
			203 33	
			8,641 93	
			4,322 91	4,322 91
				24,589 85

All of the buildings above mentioned are situated upon leasehold premises in the city of Akron, county of Summit, and State of Ohio, with the exception of one building, which is above designated in the foregoing table as "Barberton, Ohio."

Plaintiff alleges that had the Internal Revenue Service of
24 the Treasury Department allowed to the plaintiff the depreciation on said buildings in the amount of twenty-four thousand five hundred eighty-eight and 85/100 dollars ($24,588.85), as above stated, the plaintiff would have had no tax assessed against him as set forth under paragraph fourth hereafter, for the calendar year of 1920.

Plaintiff alleges that he was entitled to deduct depreciation for said buildings located on said leased premises under leases which are above stated, all of which were leases for the period of ninety-nine years, renewable forever, and under each of said leases the plaintiff was required and it was his duty, by virtue of the covenants in each

of said leases, at all times to keep the buildings equal to at least the value of the buildings which were located on said premises at the time the said leases were made, which value was as stated in the foregoing table. Plaintiff alleges that he, and not the owner in fee simple of said premises, suffered the depreciation upon the buildings located upon said leased premises. Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States of America allowed to the plaintiff depreciation upon buildings owned by plaintiff in fee simple, but refused to allow to the plaintiff depreciation upon buildings located upon premises leased by the plaintiff under leases for the period of ninety-nine years, renewable forever, containing covenants as above stated.

Fourth: Plaintiff alleges that on the 11th day of April, 1923, the Internal Revenue Service of the Treasury Department of the United States did find under the facts above set forth that the plaintiff had been overassessed for the year 1918 the sum of five hundred ninety-eight and 87/100 dollars ($598.87), but that for the year 1919 was subject to an additional tax in the amount of one thousand twenty-four and 70/100 dollars ($1,024.70), and for the year 1920, an additional tax of three hundred fifty-six and 06/100 dollars ($356.06), making total additional taxes for the years 1919 and 1920 of one thousand three hundred eighty and 76/100 dollars ($1,380.76). Deducting from said additional tax the overassessment of 1918 of five hundred ninety-eight and 87/100 dollars ($598.87), left a net additional tax of seven hundred eight-one and 89/100 dollars ($781.89). Thereafter the Internal Revenue Service of the Treasury Department allowed to the plaintiff as a credit the amount which he had paid as aforesaid under paragraph second of this petition, on the 7th day of December, 1921, in the sum of three hundred seventy-two and 80/100 dollars ($372.80), but the defendant, C. F. Routzahn, as commissioner, did demand payment from the plaintiff of the sum of four hundred nine and 09/100 dollars ($409.09) as the balance of said additional tax so assessed, remaining.

Fifth. Thereupon, following the report of the Internal Revenue Service of the Treasury Department, bearing date the 11th day of April, 1923, but mailed at Cleveland, Ohio, on the 16th day of April, 1923, the plaintiff did thereupon duly file his appeal in the office of the Commissioner of Internal Revenue in the Treasury Department in Washington, D. C., and thereafter a conference was duly held concerning the additional tax liability claimed by the Commissioner of Internal Revenue from the plaintiff as set forth in the last preceding paragraph, and concerning the amount claimed by the plaintiff which should be refunded to the plaintiff. Thereafter, namely, on the 13th day of July, 1923, the Income Tax Unit, having heard the said appeal, did render its decision through the Commissioner of Internal Revenue concerning the income tax returns of the plaintiff for the years 1918 to 1920, inclusive, and with especial

reference to the said report of the internal revenue agent in charge of Cleveland, Ohio, dated the 11th day of April, 1923, and mailed the 16th day of April, 1923, and referred to in the decision of the Commissioner of Internal Revenue as dated April 4th, 1923. In said decision of July 13th, 1923, the said Commissioner of Internal Revenue did find that, as stated in the last preceding paragraph, there was claimed to be due from the plaintiff as additional income tax, based on the income tax returns of plaintiff for the years 1918, 1919, and 1920, in the sum of four hundred nine and 09/100 dollars ($409.09), as shown in the statement below:

1918.	Over-assessment		598 87
1919.	Additional tax	651 80	
1920.	Additional tax	356 06	
		1,007 86	
	Net additional tax		598 87 409 09

26 In said decision the Income Tax Unit did further state that the claim of the plaintiff to deduct depreciation on buildings located on premises held by plaintiff under ninety-nine year leases was rejected. Thereupon the plaintiff, on the 8th day of August, 1923, did file his appeal from the decision of the Income Tax Unit in the offices of the Commissioner of Internal Revenue, Treasury Department, and thereupon the Commissioner of Internal Revenue did set the said appeal for hearing on the 29th day of August, 1923. On the 29th day of August, 1923, the said appeal was heard before the committee on appeals in the Treasury Department at Washington, D. C., and said committee and the said Commissioner of Internal Revenue, after hearing said appeal, did sustain the Income Tax Unit in its decision and did find that the plaintiff was not entitled to deduct from his income depreciation on buildings located on premises held by the plaintiff under ninety-nine year leases, renewable forever.

Sixth. Plaintiff alleges that he paid to the defendant, C. F. Routzahn, the sum of four hundred nine and 09/100 dollars ($409.09) on the 12th day of January, 1924, which amount, however, plaintiff paid to the defendant, Routzahn, under protest. Plaintiff alleges that he paid said amount of four hundred nine and 09/100 dollars ($409.09) to the defendant, Routzahn, under duress and compulsion and in an involuntary manner, and by reason solely of the fact that the said defendant, Routzahn, threatened that he would proceed against the property of the plaintiff unless the plaintiff paid to the said defendant, Routzahn, the sum of four hundred nine and 09/100 dollars ($409.09), as above set forth.

Seventh. At the same time that the said plaintiff paid the sum of four hundred nine and 09/100 dollars ($409.09), he filed two claims for abatement of tax assessed with defendant, C. F. Routzahn, collector, one for the year 1919, in which claim for abatement plaintiff

claimed that he had paid taxes for the year 1919 in the amount of one thousand two hundred thirty-five and 20/100 dollars ($1,235.20); that there was due for the year 1919 only the sum of six hundred four dollars ($604.00), which would leave a balance due plaintiff of six hundred thirty-one and 20/100 dollars ($631.20) for the year 1920. The claim for abatement for the year 1920 set forth that plaintiff owed no tax liability for that year and denied the claim of the Commissioner of Internal Revenue for the additional tax for the year 1920 of three hundred fifty-six and 06/100 dollars ($356.06); that after an examination of said claim for abatement the Commissioner of Internal Revenue rejected the same.

Eighth. That subsequently, on the 9th day of February, 1924, the plaintiff filed with said defendant, C. F. Routzahn, collector, three claims for refund of taxes illegally collected—one for the year 1918, in which he made claim for the entire amount of six hundred twenty-one and 65/100 dollars ($621.65) paid as income tax in the year 1918, one for the sum of six hundred thirty-one and 20/100 dollars ($631.20), which is the sum paid by plaintiff in excess of the sum of six hundred four dollars ($604.00) which, as the plaintiff claims, is his tax liability for the year 1919, and one for the refund of three hundred fifty-six and 06/100 dollars ($356.06) which is a part of the four hundred nine and 09/100 dollars ($409.09) paid to the said defendant, C. F. Routzahn, on the 12th day of January, 1924.

Ninth. That after consideration of said claim for refund the Commissioner of Internal Revenue of the United States rejected said claim and the said C. F. Routzahn was instructed to notify the said plaintiff of the rejection of said claim.

Tenth. Plaintiff therefore claims from the defendant, C. F. Routzahn, collector, the sum of four hundred nine and 09/100 dollars ($409.09) paid to the said defendant, C. F. Routzahn, on the 12th day of January, 1924, under protest, as aforesaid, which tax is the additional tax assessed against the plaintiff.

Wherefore, plaintiff prays judgment against the defendant, C. F. Routzahn, collector, in the sum of four hundred nine and 09/100 dollars ($409.09), the plaintiff further averring that he has always been the sole owner of the claims hereinbefore referred to and has not assigned nor transferred the whole or any part thereof, or any interest therein, and that he has at all times borne allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government; and that he believes the matters as stated herein to be true, and that he is justly entitled to the said amount from the United States, after allowing all its just debts and offsets.

J. H. WIENER,
By COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
Attorneys.

[*Duly sworn to by J. H. Weiner; jurat omitted in printing.*]

In United States District Court

Precipe for summons

To the clerk:

Issue summons in the above-entitled action for the defendant, C. F. Routzahn, collector of internal revenue, at Cleveland, Ohio, to be marshalled for the Northern District of Ohio, Eastern Division of the United States District Court, returnable according to law.

Indorse thereon: "Claim for money, amount claimed against said C. F. Routzahn, collector, four hundred nine and 09/100 dollars ($409.09)."

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

29 In United States District Court

Waiver of trial to jury

Filed Nov. 12, 1926, in case No. 12429

We, the attorneys for the respective parties, hereby waive the trial to the jury of this cause, and agree to submit the same to the court without the intervention of a jury.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

A. E. BERNSTEEN,
Attorney for Defendant.

In United States District Court

Answer to petition

Filed Dec. 7, 1926, in case No. 12429

Now comes A. E. Bernsteen, United States Attorney for the Northern District of Ohio, and files this answer on behalf of C. F. Routzahn, and says:

1. Defendant admits that the plaintiff filed his income tax return in the year 1919 for the calendar year ending December 31st, 1918, and admits that the plaintiff endeavored to make his said return in strict accordance with the requirements of the said statute. Defendant admits that the plaintiff failed to claim depreciation on buildings standing on lands which were held by plaintiff under 99 year leases, which were renewable forever. Defendant admits that the Commissioner of Internal Revenue allowed the plaintiff depreciation upon buildings owned by plaintiff in fee simple when plaintiff had a capital investment in said buildings, but refused to allow to plaintiff depreciation on buildings located on premises leased by the plaintiff under leases for 99 years renewable forever, except to the extent that plaintiff had a capital investment in said leases. Defendant denies

each and every allegation in paragraph "first" not expressly herein admitted.

30 2. Defendant admits that the plaintiff made a return for the income tax in the year 1920 for the calendar year ending December 31, 1919. Defendant admits that the plaintiff did not take depreciation in the said return upon buildings standing upon lands which were held by the plaintiff under 99 year leases renewable forever. Defendant further admits that the Commissioner of Internal Revenue allowed to the plaintiff depreciation upon the buildings owned by the plaintiff in fee simple to the extent of his capital investment therein, but refused to allow to the plaintiff depreciation upon buildings located upon premises leased by the plaintiff under leases for a period of 99 years renewable forever, except to the extent of plaintiff's capital investment therein. Defendant denies each and every allegation in paragraph "second" not herein expressly admitted.

3. Defendant admits that the plaintiff made a return for income tax in the year 1921 for the calendar year ending December 31, 1920. Defendant admits that in said return the plaintiff claimed depreciation upon buildings standing on lands owned by the plaintiff in fee and on lands which were held by the plaintiff under 99 year leases renewable forever. This defendant admits that the Commissioner of Internal Revenue allowed the plaintiff depreciation on buildings owned by the plaintiff in fee simple on his capital investment therein, but refused to allow to the plaintiff depreciation on buildings located on premises held by the plaintiff under leases for a period of 99 years, renewable forever, except to the extent of plaintiff's capital investment therein. This defendant denies each and every allegation in paragraph "third" not herein expressly admitted to be true.

4. This defendant admits the allegations of paragraph "fourth."

5. This defendant admits the allegations of paragraph "fifth."

6. Answering paragraph 6 this defendant admits plaintiff paid to C. F. Routzahn as collector the sum of four hundred nine dollars and nine cents ($409.09) under protest. This defendant denies each and every allegation in paragraph "sixth" not herein expressly admitted.

7. This defendant admits the allegations of paragraph "seventh."

8. This defendant admits the allegations of paragraph "eighth."

31 9. This defendant admits the allegations of paragraph "ninth."

10. This defendant denies each and every allegation in paragraph "tenth."

Wherefore this answering defendant prays that the action instituted against him by the plaintiff may be dismissed and that the plaintiff pay the costs herein.

A. E. BERNSTEEN,
United States Attorney.

[*Duly sworn to by A. E. Bernsteen; jurat omitted in printing.*]

In United States District Court

Stipulation, re filing of answer

Filed Jan. 15, 1927, in case No. 12,429

It is hereby stipulated that the answer in the above-entitled cas may be filed as of the 7th day of December, A. D. 1926.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

32 In United States District Court

Order granting leave to file answer to amended petition as of Dec. 7, 1926

Entered Jan. 5, 1927, in case No. 12429

On application of defendant and consent of plaintiff, leave is hereby given defendant to file his answer to amended petition as of December 7, 1926, and said answer to amended petition is accordingly filed as of December 7, 1926.

In United States District Court

Judgment for defendant

Jan. 8, 1927, case No. 12429

This matter came on to be heard before the court, the attorneys for the plaintiff and attorneys for defendant having waived in writing trial by jury herein and having consented that this cause be heard and determined by the court without the intervention of a jury, on the pleadings and agreed statement of facts which was heretofore filed in this cause.

Upon consideration thereof, the court finds upon said issues joined for the defendant and against plaintiff, to which ruling of court the plaintiff, by his attorneys, excepts.

It is, therefore, considered and adjudged by the court that the said defendant recover of plaintiff his costs herein expended taxed at ..... and that the plaintiff pay his own costs.

33 In United States District Court

Motion for new trial

Filed Jan. 8, 1927, in case No. 12,429

Now comes plaintiff by his attorneys and respectfully moves the court for a new trial in the within action, for the reasons hereinafter set forth in the attached Brief.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

In United States District Court

Order overruling motion for new trial

Jan. 8, 1927, case No. 12,429

This day this cause came on to be heard upon motion of the plaintiff for a new trial and was submitted to the court. Upon consideration thereof, the court overrules said motion, to which ruling of the court plaintiff, by his attorneys, excepts.

It is further ordered by the court that the plaintiff have fifty (50) days in which to prepare, settle and file his bill of exceptions in accord with general rule 38.

34 In United States District Court

Motion for judgment on record and stipulation of facts

Filed Nov. 12, 1926, in Cases Nos. 12,414 and 12,429

Defendant moves that judgment be rendered herein for the defendant on the record and stipulation of facts in the cause.

A. E. BERNSTEEN,
U. S. Atty., Attorney for Defendants.

In United States District Court

Request for findings of fact

Filed Nov. 12, 1926, in Cases Nos. 12,414 and 12,429

Defendant requests the court to make the following findings of fact:

1. That the properties involved herein were not used in plaintiff's trade or business.

2. That the plaintiff had no investment or capital in the properties involved herein.

A. E. BERNSTEEN,
U. S. Atty., Attorney for Defendants.

In United States District Court

Stipulation as to lease of properties

Filed Nov. 12, 1926, in cases Nos. 12,414 and 12,429

It is further stipulated that all of the properties herein were leased by the plaintiff to various parties, each of which sub-lessees used the said property for business purposes, in which business the plaintiff was not interested.

A. E. BERNSTEEN, *U. S. Atty.*
COMMINS, BROUSE, ENGLEBECK & MCDOWELL.

35 In United States District Court

Stipulation of facts

Filed Nov. 12, 1926, in cases Nos. 12,414 and 12,429

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts are correct and true and may be found by the court as facts in the case, subject, however, to any objection as to their relevancy, competency, or materiality to the issue as may be raised by either party at the trial and argument of this case. Either party may introduce further evidence in the cause.

I

Plaintiff for the years 1918, 1919, and 1920 filed his income tax returns as required by law with the collector of internal revenue in office at the time for the 18th District of Ohio.

II

Thereafter, the Commissioner of Internal Revenue assessed additional taxes against the said plaintiff for each of the said years.

A part of plaintiff's income was derived from rent received from properties located in the city of Akron, Ohio, which properties consisted of buildings on land held by plaintiff under 99-year leases, renewable forever. In all the properties held by the plaintiff under the 99-year leases, renewable forever, the buildings were erected and paid for by the lessors.

III

The revenue act of 1918, section 214 (a) (8) provides: "That in deducting net income there shall be allowed as deductions a reasonable allowance for exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

Plaintiff claimed deductions for exhaustion, wear, and tear of buildings upon land held by him under leases for 99 years, renewable forever.

The Income Tax Unit, under the Commissioner of Internal Revenue, allowed no deductions for exhaustion, wear, and tear of buildings upon land held by him under leases for 99 years, renewable forever.

36 IV

Appeal was taken by the plaintiff to the committee on appeals and review from the decision of the unit, which committee considered the appeal and sustained the action of the commissioner in disallowing plaintiff's claim for exhaustion, wear, and tear of buildings upon land held under 99-year leases and renewable forever.

V

Thereafter, plaintiff duly made payments of the additional taxes assessed against him by the commissioner, payments being made, some to C. F. Routzahn, as collector, and some to Harry H. Weiss, as collector.

VI

Thereafter, claim for refund for the amounts so paid was duly filed and thereafter duly rejected by the Commissioner of Internal Revenue.

VII

It is agreed that if the court shall find that the plaintiff is entitled to deductions under the terms of the revenue act of 1918 for exhaustion, wear, and tear of buildings upon land held under leases for 99 years, renewable forever, the amounts to be refunded to the plaintiff are as follows:

For 1918	$22.78
For 1919	1,283.10
For 1920	356.06

If the court shall find that plaintiff is entitled to judgment, judgment shall be rendered against C. F. Routzahn as collector in the sum of $409.09 with interest, and against Harry H. Weiss as collector for the sum of $1,252.85 with interest.

VIII

The leases referred to as being for 99 years, renewable forever, were thirteen in number and the material points in the said leases are as set forth in Exhibit A hereof.

IX

There is attached hereto as Exhibit B a sample form of the
37 said leases, which may be considered as typical of all the leases subject to the changes and modifications as shown in Exhibit A hereof.

X

The Commissioner of Internal Revenue allowed the plaintiff's claim for exhaustion, wear, and tear of buildings, when such buildings were erected by or paid for by the plaintiff. And also allowed plaintiff to deduct as business expenses all sums spent as repairs on all buildings which were rented by plaintiff.

COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
For Plaintiff.

A. E. BERNSTEEN, *U. S. Atty.*

Exhibit A to stipulation

Recitals as to leases referred to in this agreed statement of facts.

A

Premises	8 South Howard Street, Akron, Ohio.
Name of lessor	Eliza E. Day.
Name of lessee	J. Harry Wiener and Helen L. Wiener.
Where lease recorded	Vol. 590, page 438, Summit County records.
Annual rental	$3,500.00 per year for first five (5) years. $4,000.00 per year for balance of term.
Date of lease	August 1, 1918.
Term of lease	99 years, renewable forever, from Aug. 1, 1918.
Who pays taxes and assessments on buildings?	Lessee, excepting income and inheritance taxes charged against lessor or those claiming under her.
Insurance	Lessee required to carry insurance on buildings located on premises, for the benefit of lessor.
Is the insurance, in the event of loss, payable to a trustee?	Yes; lessor as trustee.
38 Are funds to be used by trustee in restoring building?	Yes; lessor to pay this money to lessee for restoring loss and replacing building to former condition.
Clauses of lease relative to restoration of building by lessee.	Lessee may partially or totally raze, remove, remodel, improve, or repair any building or buildings now on said premises or hereafter placed thereon, but said replaced building shall have a value equal to or greater than the buildings so razed, removed, or altered.
Covenants by lessee as to keeping buildings upon premises.	Damage or destruction of building does not release lessee from obligation of lease. No building now standing on the premises shall be removed or razed or destroyed unless bond be given by lessee to lessor, conditioned on restoring the building.

B

Premises	79 South Main Street, Akron, Ohio.
Name of lessor	Eliza E. Day.
Name of lessee	J. Harry Wiener and Helen L. Wiener.
Where lease recorded	Vol. 590, page 441, Summit County records leases.
Annual rental	First five years, $5,000.00 per year; second five years, $6,000.00 per year; remainder of term of lease $7,200.00 per year.
Date of lease	August 1, 1918.
Term of lease	99 years, renewable forever, from Aug. 1, 1918.
Who pays taxes and assessments on building?	Lessee, excepting income or inheritance taxes charged against lessor or those claiming under her.
Insurance	Lessee is required to carry insurance on buildings located on premises, for the benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes; lessor as trustee.
Are funds to be used by trustee in restoring building?	Yes, lessor to pay this money to lessee for restoring loss and replacing building to former condition.
Clauses of lease, relative to restoration of building, by lessee.	Lessee may partially or totally raze, remove, remodel, improve, or repair any building or buildings now on said premises or hereafter placed thereon, but said replaced building shall have a value equal to or greater than the building so razed, removed, or altered.
Covenants by lessee as to keeping buildings upon premises.	Damage or destruction of building does not release lessee from the obligations of the lease. No building now standing on the premises shall be removed or razed or destroyed unless a bond be given by lessee to lessor, conditioned on restoring the building.

39 C

Premises	77 South Main Street, Akron, Ohio.
Name of lessor	John Backe and Elizabeth Backe.
Name of lessee	J. Harry Wiener.
Where lease recorded	Vol. 590, page 294, Summit County records leases.
Annual rental	First ten years & ten months, $6,000.00 per yr. Remainder of term $7,200.00 per year.
Date of lease	May 1, 1918.
Term of lease	99 years, renewable forever, from May 1, 1918.
Who pays taxes and assessments on buildings?	Lessee, excepting income or inheritance taxes which lessor or those interested under him might be obligated to pay.
Insurance	Lessee is required to carry insurance on buildings located on premises for the benefit of lessor.
Is insurance, in the event of loss, payable to a trustee?	Yes; insurance is to be paid, in case of loss, to lessors as trustees.
Are funds to be used by trustee in restoring building?	Yes; lessors to pay the money to lessee for this purpose.
Clauses of lease, relative to restoration of buildings by lessee.	"Lessee or any subsequent owner under the lease has the right to partially or totally raze, remove, remodel, or repair any building or buildings now on the property, but agree to replace the building with one of value equal to or greater than the building so razed, removed, or otherwise altered."
Covenants by lessee as to keeping buildings upon premises.	There is a clause in the lease that damage or destruction, either partial or total, shall not operate so as to entitle either lessors or lessee to terminate lease. There is an option of purchase given to the lessee.

D

Premises	42 South Howard Street, Akron, Ohio.
Name of lessor	Lucinda Miller et al.
Name of lessee	J. Harry Wiener.
Where lease recorded	Vol. 694, page 40, Summit County records leases.
Annual rental	$4,000.00 per year for 7 yrs.; $4,500.00 per year for next three years; $5,000.00 per year for next ten years; and $6,000.00 per year for balance of term.
Date of lease	July 8, 1919.
Term of lease	99 years, renewable forever, from July 1, 1919.
Who pays taxes and assessments on buildings?	Lessee, excepting income or inheritance taxes which lessor or those interested under her might be obligated to pay.
Insurance	Lessee is required to carry insurance on buildings located on premises, for benefit of lessor.
40 Is insurance, in event of loss, payable to a trustee?	Yes; insurance is to be paid, in case of loss, to lessor as trustee.
Are funds to be used by trustee in restoring building?	Yes; lessors to pay the money to lessee for this purpose.
Clauses of lease, relative to restoration of buildings by lessee.	Lessee or any subsequent owner has right to partially or totally raze, remove, remodel, or repair any building on property, but must replace the building with one of value equal to or greater than building so razed, removed, or otherwise altered.
Covenants by lessee as to keeping buildings upon premises.	Lessee is obligated to erect a building to cost not less than $30,000.00 upon the premises within twenty (20) years.
Assignment of lease	J. Harry Wiener to Louis Ostrov.
Date of assignment	May 1, 1922.
Recorded	May 31, 1922, in vol. 901, page 231, Summit County records. Consent to assignment by lessors.

E

Premises	823-825 South Main St., Akron, Ohio; 819 South Main St., Akron, Ohio; and 17 and 19 E. Voris St., Akron, Ohio.
Name of lessor	Jacob Hausch and Caroline Hausch.
Name of lessee	J. Harry Wiener.
Lease recorded	Vol. 694, page 301, Summit County records.
Annual rental	$6,000.00 per year first ten (10) years; $7,200.00 per year remainder of term.
Date of lease	Aug. 27, 1919.
Term of lease	99 years renewable forever from July 1, 1919.
Who pays taxes and assessments?	Lessee, excepting income or inheritance taxes which lessors or those interested under them might be obligated to pay.
Insurance	Insurance is to be paid in case of loss to Depositors Sav. & Trust Co., Akron, Ohio, as trustee.
Are funds to be used by trustee in restoring building?	Trustee to use money for repairing property or restoring same.
Clauses of lease, relative to restoration of buildings by lessee.	Lessee may partially or totally raze, remove, remodel, improve, or repair any building or buildings now on said premises or hereafter placed thereon, but said replaced building shall have a value equal to or greater than the buildings so razed, removed, or altered.
Covenants by lessee as to keeping buildings upon premises.	There is a clause in the lease that damage or destruction, either partial or total, shall not operate so as to entitle either lessors or lessee to terminate lease.
	There is an option of purchase given to lessee.

41 Cancellation and surrender:

Dated	March 30, 1922.
Recorded	April 1, 1922, in vol. 901, page 4, Summit County records.
Signed by	Jacob Hausch, Caroline Hausch, J. Harry Wiener, and Helen L. Wiener.
Premises	Same as described in above lease.

F

Premises	616 South Main St., Akron, Ohio.
Name of lessor	Albert E. Carmichael and Jane Carmichael.
Name of lessee	J. Harry Wiener.
Lease recorded	Vol. 810, page 159, Summit County records.
Annual rental	First ten years, $2,100.00 per year; next ten years, $3,047.50 per year; balance of term, $3,657.00 per year; any renewal, $3,657.00 per year.
Date of lease	July 8, 1919.
Term of lease	99 years, renewable forever, from Aug. 1, 1919.
Who pays taxes and assessments on buildings?	Lessee, excepting income or inheritance taxes which lessor or those interested under them might be obligated to pay.
Insurance	Lessee is required to carry insurance on buildings located on premises for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes, Commercial Sav. & Trust Co., trustee. Funds to be used by trustee in restoring building.
Clauses of lease, relative to restoration of building, by lessee.	"Lessee agrees to erect on premises, within a period of six (6) years, from the date of this instrument, a new building, costing not less than $25,000.00."
Covenants by lessee, as to keeping buildings upon premises.	"In event buildings now on said premises are partially or totally razed, removed, remodeled, or repaired, said replaced buildings or repaired buildings shall have a value of equal to or greater than the buildings so razed, removed, or altered."
	"Before any building is removed or destroyed, bond shall be given to lessor, conditioned on restoring said buildings."

Supplemental agreement..	By the provisions of the supplemental agreement, dated June 22, 1922, and recorded June 27, 1922, in vol. 901, page 345, Summit County records, the provisions of said lease were changed to read as follows:
Annual rental.....	Period of ten years from March, 1922, to February, 1932, $1,020.00 per year, and for ten years from March, 1932, to February, 1942, $1,200.00 per year. Balance of term, $1,500.00 per year.
Option to purchase.....	Given to lessee, for the sum of $30,000.00.
	Lessee to erect on said premises, within two (2) years from date of instrument, a new building to cost not less than $8,000.00.
42 Release of lease....	Dated April 2, 1923.
Recorded.....	April 12, 1923, vol. 948, page 208, Summit County records.
Signed by.....	Blanche Leopold, as owner of premises, and J. Harry Wiener, as lessee.
Recitations.....	Transfer of premises by Albert E. Carmichael and Jane Carmichael to Blanche Leopold.

G

Premises.....	479 South Main St., Akron, Ohio.
Name of lessor.....	John Hausch and Albertine R. Hausch.
Name of lessee.....	J. Harry Wiener.
Lease recorded.....	Vol. 694, page 367, Summit County records.
Annual rental.....	First ten years, $5,000.00 per year; second ten years, $6,250.00 per year; balance of term, $7,500.00 per year.
Date of lease.....	December 18, 1919.
Term of lease.....	99 years, renewable forever, from Jan. 1, 1920.
Who pays taxes and assessments on buildings?	Lessee, excepting income or inheritance taxes, charged against lessors or those claiming under them.
Insurance.....	Lessee is required to carry insurance on buildings located on premises for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes; insurance to be paid to lessors as trustees.
Are funds to be used by trustee in restoring buildings?	Yes; lessors to pay money to lessee for this purpose.
Clause of lease relative to restoration of building, by lessee.	Lessee to make permanent improvements in the way of new buildings to the value of $10,000.00.
Covenants by lessee as to keeping buildings upon premises.	Lessee has right to partially or totally raze, remove, remodel, or repair any building or buildings on property, but agrees to replace building with one of value equal to or greater than buildings so razed, removed, or otherwise altered.
Cancellation and surrender of 99-year lease.	Dated March 30, 1922.
	Recorded April 1, 1922, in vol. 901, page 6, Summit County records.

H

Premises.....	Southeast corner of E. Tuscarawas & 3rd St., Barberton, Ohio.
Name of lessors.....	Dora M. Moore, Villa R. Kirkpatrick, Ray Kirkpatrick, Fred M. Weller, Lena Weller, Nellie Middleton.
Name of lessee.....	J. Harry Wiener.
Lease recorded.....	Vol. 810, page 600, Summit County records.
Rental.....	$10,000.00 per year, in equal quarterly installments in advance.
Date of lease.....	June 1, 1920.
43 Term of lease.....	99 years, renewable forever, from June 1, 1920.
Who pays taxes and assessments on building?	Lessee pays all excepting income or inheritance tax, which may be assessed against lessor.

Insurance	Lessee required to carry insurance on buildings located on premises, for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes.
Are funds to be used by trustee in restoring building?	Yes; the funds are to be available to lessee for purpose of rebuilding and restoring the buildings. The lessee must supply any excess in cost of construction not provided by insurance money.
Clauses of lease, relative to restoration of building, by lessee.	Lessee is not relieved from obligation to pay rent or to carry out terms of lease if building is destroyed from whatever cause.
Covenants by lessee as to keeping buildings upon premises.	"The lessee agrees that he will at all times during the continuance of this lease, keep all buildings now or hereafter on said premises, in continuous, good, substantial, and tenantable order and repair at lessee's own cost and expense."
	Lessee is further given the right, totally or partially, to "raze, remove, remodel, improve, or repair the improvements on the premises, but he shall first give bond to lessor in amount of the value of existing buildings that he will replace the buildings, free from mechanics' liens."
	An option to lessee to purchase the demised premises in fee simple at any time within ten (10) years from date of lease is granted in the lease.

I

Premises	36 South High Street, Akron, Ohio.
Name of lessor	Charles Wadsworth and Anna Doyle Wadsworth.
Name of lessee	J. Harry Wiener.
Lease recorded	Lease not recorded.
Annual rental	$7,800.00 per year for first ten years; $10,500.00 per year for second ten years; $12,500.00 per year during balance of term.
Date of lease	April 12, 1920.
Term of lease	99 years renewable forever from May 1, 1920.
Who pays taxes and assessments on buildings?	Lessee, excepting income or inheritance tax which lessors or those claiming under them might be obligated to pay.
Insurance	Lessee required to carry insurance on buildings located on premises for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes; the Central Savings and Trust Company, of Akron, Ohio, as trustee.
44 Are funds to be used by trustee, in restoring buildings?	Yes; any surplus to revert to lessee and lessee to furnish additional funds if insurance not sufficient.
Clauses of lease, relative to restoration of building by lessee.	Lessee may tear down and erect new buildings of a value of not less than $100,000.00 by executing proper indemnity bond of not less than $500,000.00 and furnish complete set of plans of new improvements.
	Lease not to terminate by reason of damage or destruction of buildings.
Covenant by lessee as to keeping buildings upon premises.	Lessee to keep and maintain buildings at present value of $70,000.00 or replace at a value of $100,000.00.

J

Premises	376 E. Market Street, Akron, Ohio.
Name of lessor	Flora B. Ewart.
Name of lessee	J. Harry Wiener and Louis D. Freiberg.
Lease recorded	Vol. 694, page 11, Summit County records.
Annual rental	$4,000.00 per year.
Date of lease	July 2, 1919.
Term of lease	99 years, renewable forever, from July 1, 1919.

Who pays taxes and assessments on buildings?	Lessee, excepting income and inheritance taxes which lessor or those claiming under her are obligated to pay.
Insurance	Lessee is required to carry insurance on buildings located on premises for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes; lessor as trustee.
Are funds to be used by trustee in restoring buildings?	Yes; trustee to pay this money for restoring building.
Covenants by lessee as to keeping buildings upon premises.	Lessee covenant to maintain on demised premises, building or buildings, the fair value of which shall be not less than $40,000.00.
Cancellation of lease	Dated Sept. 7, 1922. Recorded Oct. 9, 1922, in vol. 902, page 280, Summit County records.

K

Premises	282 E. Market Street, Akron, Ohio.
Name of lessor	Jeanette W. Weary and Frank O. Weary.
Name of lessee	The Akron Associates Co.
Lease recorded	Vol. 590, page 223, Summit County records.
Rental—annual	$2,500.00 first five years; $3,000.00 next twenty years; $4,000.00 next twenty-five years; $5,000.00 next twenty-five years; and $6,000.00 per year, during balance of term.
Date of lease	January 12, 1918.
Term of lease	99 years, renewable forever, from Jan. 15, 1918.
45 Who pays taxes and assessments on buildings?	Lessee, excepting income and inheritance taxes which lessor, or those claiming under them might be obligated to pay.
Insurance?	Lessee is required to carry insurance on buildings located on premises, for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes.
Are funds to be used by trustee in restoring building?	Yes.
Clauses of lease relative to restoration of building by lessee.	Lessee may remodel any building on demised premises but agrees to replace said building by one of value not less than $15,000.00.
Assignment of lease to	J. Harry Wiener and L. D. Freiberg.
Dated	April 22, 1919.
Recorded	April 28, 1919, in vol. 695, page 100, Summit County records.
Assignment of lease	By J. Harry Wiener et al. to Richard H. Leighton.
Dated	December 15, 1924.
Recorded	December 16, 1924, in vol. 1009, page 428, Summit County records.

L

Premises	192 South Main Street, Akron, Ohio.
Name of lessor	A. H. Noah.
Name of lessee	J. Harry Wiener. (On or about Nov. 1, 1919, J. Harry Wiener assigned an undivided one-half interest in lease to Louis Freiberg.)
Lease recorded	Volume 590, page 612, Summit County records of leases.
Annual rental	First five years, $10,000.00 per year; second five years, $15,000.00 per year; next 10 years, $20,000.00 per year; remaining 79 years, $25,000.00 per year.
On or about May 13, 1922, rent modified	To 31st day of May, 1922, $10,000.00 per year; next five years, $8,000.00 per year; next three years, $10,000.00 per year; next five years, $12,500.00 per year; next five years, $15,000.00 per year; remainder of term, $17,000.00 per year.

Date of lease	June 2, 1919.
Term of lease	99 years, renewable forever, from June 1, 1919.
Who pays taxes and assessments on buildings?	Lessee.
Insurance?	Lessee is required to carry insurance on buildings located on premises, for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes.
46 Are funds to be used by trustee in restoring buildings?	Yes; these funds are available to lessee for such repair or restoration, providing lessee supply any additional funds necessary to complete the repair or restoration of such buildings.
Clauses of lease relative to restoration of building by lessee.	Under Section V of the lease, the lessee is allowed to remove the buildings and improvements standing on the premises and to wreck them, providing he give bond for the restoration of the buildings so removed, of a value of not less than $100,000.00. Lessor is given right to supervise plans. Sec. XI of the lease states that the lease is not to be detetmined by reason of destruction of or damage to any building or buildings by fire or otherwise.
Covenants by lessee as to keeping buildings upon premises.	"It is mutually agreed between the parties hereto that the buildings now on said premises are of the value of more than $100,000.00, and said lessee, accordingly, hereby covenants and agrees at all times to keep and maintain the buildings and improvements from time to time on said premises in good repair and proper rentable condition and (except during periods allowed by this lease for repairs and alterations or for reconstruction, in case of loss or damage to such buildings or improvements, or for erection and construction of a new building or buildings on said premises) at all times during the term of this lease to maintain on the premises above described a building or buildings, the fair cost and value of which, excepting natural depreciation, shall be not less than $100,000.00 and in case of removal or destruction from any cause whatsoever said building or improvements or any part thereof on any buildings or improvements, at any time standing on said land, that he will replace the same at his own cost and expense with a new building or buildings, the character and fair cost and value of which shall fulfill the requirements of this lease, which replacement shall be commenced within six months and be completed, free from liens and debts, within eighteen (18) months after such removal or destruction is begun, and such replacement shall be made as often as such removal or destruction occurs." Under Sec. XV of lease, in case any difference between parties as to value of any existing building, the value is to be determined by arbitration. Sec. XVI grants option to purchase to lessee.

47 N

Premises	68 North Howard Street, Akron, Ohio.
Name of lessor	Higbee Srutowicz and Helen Srutowicz.
Name of lessee	J. Harry Wiener and Louis D. Freiberg.
Lease recorded	Vol. 810, page 44, Summit County records.
Annual rental	$2,100.00 per year for five years; $2,400.00 per year for balance of term.
Date of lease	February 13, 1920.
Term of lease	99 years, renewable forever, from March 1, 1920.
Who pays taxes and assessments on buildings?	Lessee, excepting income and inheritance taxes which lessors or those claiming under them might be obligated to pay.

Insurance	Lessee is required to carry insurance on buildings located on premises for benefit of lessor.
Is insurance, in event of loss, payable to a trustee?	Yes; lessors as trustee.
Are funds to be used by trustee in restoring buildings?	Yes; these funds are available to lessee for such repair or restoration.
Clauses of lease relative to restoration of building, by lessee.	Lessee has the right to partially or totally raze, remove, remodel, or repair any building or buildings on property, but agrees to replace building with one of value equal to or greater than buildings so razed, removed, or otherwise altered.
Assignment to owners and acceptance.	Dated April 28, 1922. Recorded May 2, 1922.

Exhibit B to stipulation

(Copy of original lease)

Lease:

This indenture of lease, made in the city of Akron, county of Summit, and State of Ohio, this 12th day of April A. D. 1920, by and between Anna Doyle Wadsworth and Charles Wadsworth, of the city of Chicago, State of Illinois, hereinafter designated as "lessor," and J. Harry Wiener, of the city of Akron, Ohio, hereinafter designated as "lessee."

Witnesseth:

That the said lessor for and in consideration of the rents herein reserved and covenants and agreements hereinafter contained,
48 and by the said lessee to be paid and performed, have leased and demised, and by these presents do lease and demise unto the said lessee, his heirs and assigns all the following described real estate, to wit:

Situated in the city of Akron, county of Summit, and State of Ohio, and known as being the south 40.29 feet front and 40.37 feet in the rear of lot No. 8 in block 6, King's addition to the city of Akron, as surveyed by A. G. Mallison, surveyor and recorder in Plat Book "U," pages 555 to 566, inclusive.

Reserving to the use of the K. of P. Building Company, its successors or assigns, the right to occupy with the brick building as at present located upon said premises herein described, and more particularly described as follows: Beginning at a point in the north line of the premises herein conveyed where the same intersects the east wall of the brick building now located thereon; thence south along the east wall of said building about five (5) feet to the southeast corner thereof; thence westerly along the south wall of said building about 35 feet to the southwest corner thereof; thence northerly along the west wall of said building about five (5) feet to the north line of the premises herein described; thence easterly along the said north line about thirty-five feet to the place of beginning. It is hereby agreed and understood that the right herein reserved shall terminate upon the total or partial destruction of the above-

described brick building from any cause whatsoever and that the right herein reserved is for the occupancy of said building as at present located on the tract of land herein described.

To have and to hold the above demised premises unto the said lessee for and during the term of ninety-nine (99) years, beginning on the 1st day of May A. D. 1920, and ending on the 30th day of April, A. D. 2019, at and upon the following terms and subject to the covenants, conditions, and stipulations herein expressed and declared of and concerning the same, and renewable forever.

SECTION I. That during the term of this lease the said lessee will pay as rent to the lessor from May 1st, 1920, to April 30th, 1930, at the rate of seven thousand eight hundred dollars ($7,800.00) per year and shall pay the same in monthly installments of six hundred fifty dollars ($650.00) each month, payable on the 1st day of each month in advance, beginning May 1st, 1920.

49 For the next ten years of the term of this lease, that is, from May 1st, 1930, to April 30th, 1940, at the rate of ten thousand five hundred dollars ($10,500.00) per year and shall pay the same in monthly installments of eight hundred seventy-five dollars ($875.00) each, payable on the 1st day of each month in advance, said first payment to be made May 1st, 1930.

For the entire balance of the term of this lease and of any renewal thereof lessee shall pay to lessor rent at the rate of twelve thousand five hundred dollars ($12,500.00) per year and shall pay the same in monthly installments of one thousand forty-one and 66/100 dollars ($1,041.66) each month, payable on the 1st day of each month in advance, said first payment to be made May 1st, 1940.

All rents accruing under this lease shall be paid in gold coin of the United States of America of the present standard of weight and fineness or its equivalent, and until some other place of payment is designated in writing by the lessor such rent shall be payable to the lessee at Chicago, Illinois.

SECTION II. As a part of the consideration of this lease and additional to the rental hereinbefore provided, said lessee hereby covenants and agrees to pay punctually as and when the same becomes due all taxes, assessments, and public charges of every kind and nature levied or assessed upon the premises hereinbefore described and upon said leasehold estate thereon and upon any and all buildings and improvements thereon during said term beginning with the taxes and assessments due and payable after July 1st, 1920. Also to pay all charges, liens, penalties, and claims for damages chargeable to or payable for or in respect of the premises and leasehold estate therein, the building and improvements thereon and the use and occupation of said premises during said entire term and to indemnify and save harmless the said lessor, this lease and said premises, leasehold estate, buildings, and improvements from and against all such taxes, assessments, charges, liens, penalties, and claims for damages;

and promptly after making such payments, to furnish said lessor when notified in writing so to do with written duplicate receipt or, if impossible to obtain such, then other written evidence of payment showing that same have been paid. Provided, however, that said lessee shall not be charged with any obligations to pay any income or inheritance tax which at any time may be levied against the rental accruing hereunder by the laws of the United States, State of Ohio, or any foreign country.

Lessee further covenants that in the event of any suit or legal proceeding arising out of any act, omission, or default of or in connection with the occupation of said premises by said lessee, to which the said lessor as owner of said premises may be made a party, and in which there is or may be a liability, said lessee shall and will, at its own expense, undertake and conduct the defense of the lessor's right therein, and in that respect indemnify and save harmless the lessor from any and all liability, including liability on account of injury or damage done to the persons or property of third persons, attorneys' fees chargeable to the lessor, or any other charge arising through the occupancy and maintenance by the lessee, its agents, or employees, of the building and improvements now upon the demised premises or by reason of the negligence of the lessee, his agents or employees in the construction and maintenance of any new building or structure thereon constructed and will pay any and all judgments that may be rendered against the lessor in any such suits.

SECTION III. The said lessee hereby agrees to promptly and fully obey and comply with, at his own proper cost and expense with all lawful requirements, rules, regulations, laws, and ordinances, of all legally constituted authorities existing at any time during the continuance of this lease and in any way affecting said premises or the buildings or improvements thereon, or in the use of same, and to permit no unlawful or immoral business or occupation to be carried on upon said premises, or use to be made of any part thereof contrary to any valid law or ordinance governing the same. The lessee further covenants and agrees that he will save and keep harmless the lessor and the above-demised premises at all times during the continuance of this lease from all damages, claims, fines, attorneys' fees, penalties, costs, and expenses whatsoever that may result to the lessor or said above demised premises or to any improvements at any time situated thereon under the provisions of the present or future statutes of the State of Ohio or of the United States or concerning the sale, use, or giving away of any spirituous, fermented, or intoxicating liquors on said demised premises or in or upon any improvements at any time situated thereon.

SECTION IV. It is mutually agreed between the parties hereto that the value of the buildings now constructed upon said premises is of the value of seventy thousand dollars ($70,000.00), and said lessee accordingly hereby covenants and agrees at all times to keep and maintain the buildings and improvements from time

to time on said premises in good repair and in proper condition and (except during the periods allowed by this lease for the repairs and alterations or for reconstruction in case of loss or damage to such buildings and improvements or for the erection or construction of a new building or buildings on said premises), at all times during the term of this lease to maintain on the premises above described a building or buildings, the fair cost or value of which shall not be less than seventy thousand dollars ($70,000.00), it being the intention of the parties hereto that lessee shall keep and maintain the buildings now on said premises in like condition as the same now are in and in case of the removal or destruction from any cause whatsoever of said buildings or improvements, or any part thereon, or any buildings or improvements at any time standing on said premises, that he will replace the same at his own proper cost and expense with a new building or buildings, the character and fair cost and value of which shall not be less than one hundred thousand dollars ($100,000.00), which replacement shall be commenced within six (6) months after the date of destruction and shall be completed free from liens and debts within eighteen (18) months after such removal or destruction is begun, unless lessee shall be delayed or prevented from completing said reconstruction by war, strikes, or lockouts, in which event the said new buildings shall be constructed and completed as herein provided within eighteen months (18), exclusive of the time lost by the delay caused by war, strikes, or lockouts.

SECTION V. It is further covenanted and agreed by and between the parties hereto that the lessee may tear down and wreck the improvements now standing on said premises for the purpose of erecting and constructing thereon new buildings and improvements of the value of not less than one hundred thousand dollars ($100,000.00), and in accordance with the provisions hereof, and at any time when the lessee shall not be in default of any of the covenants and
52 conditions herein contained to be kept, observed, and performed by the lessee and shall have paid all the rentals, taxes, assessments, insurance premiums, and other charges of every kind which shall have accrued under this lease at the date of his beginning so to wreck or remove said improvements and not then unless the lessee shall have executed and delivered to the lessor his surety bond hereinafter required, and it is further agreed that all materials and wreckage of the improvements torn down or removed for the purpose of erecting said new improvements as aforesaid may be taken and applied by the lessee for his own use without making payment therefor.

It is further expressly understood and agreed that lessee will before commencing to wreck or remove improvements now or then standing on said premises execute and deliver to the lessor a good and a sufficient bond with surety or sureties approved by and satisfactory to the lessor, or with surety signed by a surety or bonding

company having net assets of not less than five hundred thousand dollars ($500,000.00), and authorized to do business in the State of Ohio, said bond to be in the principal sum of one hundred forty thousand dollars ($140,000.00) payable to the lessor, conditioned that such new improvements shall be erected as herein prescribed and when such improvements are completed and paid for free and clear from any liens of mechanics, material men, or other claims, or the possibility thereof, the principal of said bond shall be satisfied and said bond shall be cancelled and returned.

It is further covenanted and agreed that lessee will, before proceeding with the work of the construction of said new improvements, upon the request of the lessor in writing furnish to the lessor a complete set of the final plans and specifications of such proposed new improvements to the end that the lessor may be able to see in advance that the requirements hereinbefore stated in this lease concerning said new improvements will be fully complied with, and the lessee covenants and agrees that said improvements shall be constructed in accordance with said plans and specifications.

SECTION VI. Said lessee further covenants and agrees to keep the buildings and improvements now and hereafter
53 upon the leased premises during the term of this lease insured against loss or damage by fire in responsible insurance companies, authorized to do business in the State of Ohio, in an amount equal to not less than the full insurable value of the fair cost of the construction of such buildings and improvements, with a clause in each policy providing that loss, if any, shall be payable to The Central Savings and Trust Company, of Akron, Ohio, as trustee, for the parties hereto, or to such other bank or trust company in Akron, Ohio, as the lessor may from time to time designate as such trustee; provided, further, that if the lessor herein desires and is able to insure said buildings in any amount or amounts in excess of the insurance thus carried by lessee, lessor may procure said further insurance and upon depositing the policies therefor with said trustee, lessor may collect and lessee shall pay the premiums on said additional insurance as the same are payable. Said policies shall be procured by the lessee and delivered to and lodged with such trustee, and in case of a loss covered by said insurance all money collected under such policies shall be paid to and held by such trustee for said parties and as security to the lessor for the repair of such loss or damage or the rebuilding of the buildings and improvements on said land and as security to the lessor for the payment of rent, taxes, assessments, and other charges and sums, herein agreed to be paid by the lessee; it being understood, however, that all amounts so collected shall be available to the lessee for such repairs or reconstruction as the case may be, and shall be by such trustee paid out from time to time on architect's estimates, or builder's vouchers, showing the application of the amount paid for such repair or reconstruction, and then only upon the presentation of waivers of right to lien by all contractors or others that have furnished material or perf ormed labor

on said premises; provided, however, that it first be made to appear to the satisfaction of the trustee that the lessee has provided for all additional funds necessary for such repairs or reconstruction of any such buildings or improvements so injured or destroyed according to the plan adopted therefor, which may be in excess of the amount received upon such insurance policies, and if said damage shall be completely repaired, or said buildings and improvements shall be rebuilt or restored to the condition as by this lease required
54 for the time being, without the expenditure of all the money so received from said insurance policies and all rents, taxes, assessments, and other charges and sums herein agreed to be paid by the lessee, which up to that time have become due and payable, shall have been paid and discharged by said lessee, then the surplus of such insurance money shall be paid by the trustee to the lessee; otherwise said rents, taxes, assessments, other charges or sums shall be first deducted from such surplus and paid to the lessor; and the lessee further agrees to pay all reasonable charges, costs, and expenses of the trustee for handling and collecting the insurance under the provisions hereof.

The lessee further covenants and agrees that if the amount so recovered from said insurance policies shall not be sufficient to properly repair the damage incurred, or to restore or construct, a building or buildings and improvements upon said premises which shall comply with the requirements of this lease, he will furnish all additional funds necessary for such purpose.

Provided, always, that in case the lessee does not enter upon the reconstruction or repair of such building or buildings and improvements, and prosecute the same to completion in the manner and within the time required by the terms of this lease, then the amount so collected or the balance thereof remaining in the hands of the trustee, as the case may be, shall be held by the trustee as security for the continued performance and observance by the lessee of the terms, conditions, and covenants of this lease upon him so devolving, and if in such case, or in case of the violation of or noncompliance with any of the other terms, covenants, or conditions of this lease, the lessor shall have exercised his option to terminate this lease as herein provided, then said trustee shall pay to the said lessor all the funds in its possession, to fully compensate said lessor for any and all damages and loss which they have sustained by reason of any of said defaults and noncompliance of said lease.

SECTION VII. In case of any default on the part of the lessee in procuring and delivering the policies of insurance as hereinabove required, or in the payment of any amount or amounts herein required to be paid by him, other than the amounts payable as
55 rent, so-called, the lessor may procure and pay for such insurance, and make other payment or payments, and the lessee hereby covenants and agrees thereupon and at once to reimburse and pay the said lessor the sums so paid, with interest thereon at the rate of eight per cent (8) per annum from the date of payment.

SECTION VIII. The parties hereto mutually agree that the whole amount of rent to be received by the lessor and agreed to be paid hereunder by the lessee, and all other moneys due hereunder by reason of any engagement of the lessee, are and always shall be a valid and first lien upon the building or buildings and improvements from time to time upon said premises, and upon all of the interest of the lessee in said premises and in this lease.

SECTION IX. Said lessee futher covenants and agrees that he will not permit or suffer any mechanics', material men's, or other liens or charges to stand against the leased premises or property which might in any way injure or incumber or become a lien upon said leased premises and property prior or paramount to the interest of the lessor herein, and that, except as hereinafter provided, he will forthwith, upon demand, pay and discharge any and all such liens and charges; and that he will commit no waste upon said leased premises or buildings or improvements thereon, at any time during the term of this lease.

SECTION X. Lessee further covenants and agrees that no assignment or transfer of this lease shall be made by said lessee at any time without written consent of the lessor, unless said lessee shall up to that time have observed and performed all the terms, conditions, and covenants of this lease devolving upon him and shall have made and paid for the improvements so that the buildings on said premises at the date of said assignment shall be of the value of one hundred thousand dollars ($100,000.00); provided, however, that this lease may be assigned and transferred before the value of the building on said premises is of the value of one hundred thousand dollars ($100,000.00), providing said lessee, his heirs or assigns, execute and deliver to the lessor a bond with individual or personal sureties approved by and satisfactory to the lessor, her heirs
56 or assigns, or with sureties signed by some surety or bonding company having net assets in the sum of five hundred thousand dollars ($500,000.00) authorized to do business in the State of Ohio, said bond to be in the principal sum of forty thousand dollars ($40,000.00), payable to the lessor, their heirs or assigns, shall observe and perform all the terms and conditions of this lease and that said lessee, his heirs or assigns, will erect and construct a new building on said premises, or improvements to the building now on said demised premises which shall increase the value of said building so that the same shall be of the value of one hundred thousand dollars ($100,000.00), and upon the failure of the said lessee, his heirs or assigns, so to perform the terms and conditions of this lease and to make the improvements herein required to be made, the principal sum of said bond shall be forfeited and paid to the lessor, their heirs or assigns, and upon said payment the lessee, his heirs or assigns, shall be released from the obligation to construct said new building or to make said alterations in present building so that the value of same shall be one hundred thousand dollars ($100,000.00).

Said assignment shall not then be made unless the lessee shall have first delivered to the lessor for inspection during a period of three days a legal and sufficient instrument of assignment to and assumption of the covenants by such assignee; nor unless such instrument be recorded in the office of the recorder of Summit County, Ohio, at about the time of the delivery thereof; provided however, that the lessee may, at any time after date of this instrument directly or by conveyance in trust for that purpose, mortgage or pledge his estate in the premises to secure any actual debt, but the right of the lessor to have a first lien upon said premises, the interest of the lessee therein, and upon the buildings and improvements thereon as provided in Section VIII of this lease, shall not be in any manner affected thereby.

SECTION XI. This lease shall not terminate by reason of the destruction of or damage to any building or buildings and improvements, now or hereafter on said premises by fire or otherwise, any law of the land to the contrary notwithstanding, and neither of the parties hereto shall be thereby released from any obligation created or imposed upon them thereby.

37 SECTION XII. The waiver by the lessor of any breach of any of the terms, conditions, covenants, or stipulations of this lease on the part of the lessee shall not be construed to be a waiver of any other term, condition, covenant, or stipulation, or any subsequent breach of the same term, condition, covenant, or stipulation.

SECTION XIII. All notices which may be proper and necessary for the parties hereto to serve upon each other shall be in writing, and upon the lessor at their residence in Chicago, Illinois, and upon said lessee at No. 71 Bowery Street, Akron, Ohio, or made upon a resident bank or trust company or agency at Akron, Ohio, as either party may by notice in writing served upon the other from time to time designate and appoint.

SECTION XIV. Nothing in this lease contained shall prevent the lessee from contesting, at his own expense, any unlawful tax, charge, lien, or claim of whatsoever nature, in respect to the premises hereby leased; and the lessee may, in the name of the lessor, or in his own name, contest or oppose such unlawful tax, charge, lien, or claim, of whatsoever nature, without liability of forfeiture of this lease, and any resulting delay in the settlement of said taxes or other charges, liens, or claims, shall not jeopardize the interest held or acquired by said lease.

SECTION XV. In the event of any difference arising between the parties hereto as to the value of any of the building or buildings and improvements now or hereafter constructed, or being maintained upon the leased premises, such differences shall be determined by arbitration by three disinterested free holders of the county of Summit, Ohio, one of whom shall be chosen by each of the parties hereto, and the two chosen shall select a third, and the decision of any of the two said arbitrators shall be final and conclusive upon the parties hereto, which decision shall be in writing, signed in duplicate

by any two of said arbitrators, and delivered one to the lessor and the other to the lessee.

The party desiring such arbitration as aforesaid shall give written notice to the other party of such desire, naming therein the arbitrator selected by him, and the party so notified shall, within ten (10) days after receiving same, name his arbitrator and give written notice thereof to the other party. In the event such party
58 shall fail, within said period of ten (10) days, to name his arbitrator, and so notify the other thereof in writing, or in the event the two so chosen shall fail, within thirty (30) days, to agree upon the third, then the judge of the probate court of Summit County, Ohio, or any other court of said county, shall, on the request of the party not in default, or on the request of either party, as the case may be, and within fifteen (15) days thereafter, appoint a disinterested free holder of the county of Summit, Ohio, to fill the place of the arbitrator remaining vacant by reason of the failure of one of the parties hereto to appoint his arbitrator, or by reason of the failure of said two arbitrators to agree upon the third and said board of arbitration shall make its findings and report its decision within thirty (30) days from the date on which the last member of said board was selected or appointed, as provided for herein.

In every case in which matters under this lease are submitted to arbitrators, one half of the expense of such arbitration shall be borne by the lessor and the other half by the lessee.

SECTION XVI. This lease is made upon the condition that the lessee shall punctually perform, observe, and comply with all of the terms, conditions, covenants, agreements, and stipulations by him to be performed, observed and complied with hereunder, and if at any time there shall be any default on the part of the lessee in the performance of any of the terms, conditions, covenants, agreements, and stipulations by him to be performed, observed, and complied with hereunder, the lessor may serve upon the lessee at any time after such default a written notice of such default, and if such default continues for a period of thirty (30) days after the service of said written notice, the lessor may at any time after the expiration of such thirty (30) days, elect to terminate this lease and re-enter upon the premises and have possession thereof, and sue for and collect all amounts for the payments of which the lessee shall then be in default, and thenceforth this lease shall be void to all intents and purposes, and any and all buildings and improvements then upon said premises shall become the property of the lessor without compensation to be paid therefor, and as a full and complete forfeiture of the rights of the lessee; or the lessor may at any time after such default hereunder sue for and collect any and all sums due
59 them hereunder as well as for all damages they may have sustained by reason of such default, without forfeiting this lease, at their option.

SECTION XVII. The lessee hereby waives all demands which are or may be necessary and required, either by the provisions of this lease or by law, and the lessee agrees that in case of default of any of the

terms, conditions, covenants, stipulations, and provisions of this lease that the same effect will be given to said default as if all demands which are required by this lease or are or may be necessary by law had been fully and properly made.

SECTION XVIII. The remedies given in this instrument to the lessor are cumulative and shall be in addition to all other remedies now or hereafter existing, whether at law, in equity, or by statute.

SECTION XIX. It is further agreed by the said lessee to and with the said lessor, as a part of the consideration of this lease, that any new building or buildings or improvements erected on the herein demised premises during the term of this lease shall upon the expiration or termination hereof revert to and become the property of the said lessor.

SECTION XX. Lessor does hereby transfer and assign to the said lessee all rights of said lessor under and all interest in existing leases on said demised premises, the rents reserved thereby, and any of the benefit and advantages in any way thereafter to accrue to the lessor therefrom, and the said lessee takes this lease subject to all existing leases now on said premises, and the lessor further covenants and agrees that the lessee shall have peaceable possession and enjoyment of the leased premises without lawful let, hindrance, or disturbances of any person or persons, whomsoever, by, through, or under the lessor, excepting only as hereinbefore expressed, providing however, the said lessee will comply with all the terms and conditions of this lease.

SECTION XXI. All of the grants, terms, covenants, conditions, and stipulations in this lease contained shall inure to the benefits of the and be binding upon the parties thereto and their respective heirs, personal representatives, successors, and assigns, whether or not the same be expressed.

60 In testimony whereof the parties to this lease set their hands to duplicates hereof this 12th day of April, A. D. 1920.

ANNA DOYLE WADSWORTH.
CHARLES WADSWORTH.
J. HARRY WIENER.

Signed and acknowledged in the presence of—

C. BLAKE MCDOWELL.
MABEL BENKHEUSER.

STATE OF OHIO,
Summit County, ss:

Before me, a notary public in and for said county, personally appeared Anna Doyle Wadsworth and Chas. Wadsworth and J. Harry Wiener, who acknowledged that they did sign the foregoing instrument, and that the same is their free act and deed.

In testimony whereof I have hereunto set my hand and official seal at Akron, Ohio, this 12th day of April, 1920.

C. BLAKE MCDOWELL,
Notary Public.

In United States District Court

Memorandum opinion

Filed Dec. 9, 1926, in cases Nos. 12,414 and 12,429

WESTENHAVER, District Judge.

These actions are brought to recover income taxes for the years 1918, 1919, and 1920, paid under protest. The conditions precedent to the right to maintain them have been complied with. They have been heard and submitted upon an agreed statement of facts. As all material facts and questions of law are the same in both cases, they will be disposed of in one memorandum.

61 The question involved is the right of plaintiff, as lessee of real estate under 99-year leases, renewable forever, to deduct depreciation on buildings in addition to a deduction of all sums paid as rent or for repairs and maintenance. This right is claimed under favor of the provisions of the revenue act of 1918, in force when the taxes were levied and assessed. Its pertinent provisions are as follows:

"SEC. 214. (a) That in computing net income there shall be allowed as deductions:

* * * * * * *

"(8) A reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for obsolescence."

The foregoing is an old provision. It is found substantially in the same terms in the corporation excise tax law of 1909. It has been reenacted in precisely the same form in all subsequent revenue acts. It has been given a uniform departmental construction ever since it was so enacted, and that construction is the one adopted and applied in the present cases.

The object of the law, as well as its effect, is to get an accurate determination of the taxpayer's annual income. If he has capital invested in buildings and those buildings are used in his trade or business, it is necessary to allow and deduct a reasonable depreciation in order that his net income may be correctly ascertained. If he has no capital so invested, his net income will be correctly determined by deducting from his gross income all rent paid for the use of the buildings in which he carries on his trade or business. When the facts of the present case are stated and rightly understood, no different situation will be presented.

The plaintiff during the years 1918, 1919, and 1920 was the owner of 99-year leases, renewable forever, on 13 separate parcels of real estate. None of these leases were acquired prior to March 1, 1913, the date when the income tax amendment went into effect. On the contrary, nearly all were acquired during the profiteering years 1918 and 1919. He paid no money by way of bonus or purchase

price for any one of the leases, but agreed to pay, after having
62 possession, an annual rent at stated intervals. He did not use or occupy any one of them in carrying on any trade or business, but merely sublet the same to tenants and collected the rents. In ascertaining his net taxable income, he was permitted to deduct all sums paid by him for repairs, maintenance, and upkeep, as well as the full amount of all sums paid as rent. It is stipulated that he was also permitted to deduct depreciation upon all buildings which were erected or paid for by him. All the leases contain forfeiture clauses permitting the lessor, on thirty days' written notice, to avoid the same and enter into possession, both for failure to pay rent or to comply with any of the other covenants or provisions.

In my opinion, plaintiff's net income from these leases was correctly ascertained. He is not entitled to any other or additional deduction than was given him. Inasmuch as he had no capital investment in these leases, any allowance for depreciation on buildings would be a contribution to his capital account rather than a deduction in order to prevent an inclusion of some part of his capital as income. In substance and for all practical purposes, his annual payment of rent bought only a term for one year in the several leased premises. Hence, when he is permitted to deduct the full amount of the rent paid, together with repairs and maintenance, he is made whole with respect to his net income. Any further and additional allowance by way of depreciation of invested capital would be a mere contribution.

Even if it be true, as is urged, that under the law of Ohio a 99-year lease, renewable forever, is not personalty but is a freehold estate in lands and has many of the attributes of an estate in fee, the situation for income-tax purposes is not thereby changed. Nor is it material that the lessee is not exonerated from liability in the event a building may be destroyed, or that he is required to erect a new building within a given period, or that in the event of the destruction by fire or otherwise of any building he is required to replace the same with another of equal or greater value, or that he is required to maintain the buildings at their present value or at any stated value. The several leases contain clauses imposing these obligations and impose forfeiture for failure to comply with them. But the important fact is that during the several years in question here the plaintiff did not make any such capital expenditures and has been permitted
63 to deduct all sums paid for rent or for repair and maintenance and has been allowed proper depreciation on all buildings erected or paid for by him. It will be time enough to consider the question of allowing depreciation, under any of the conditions above stated, when the contingency shall have happened.

That such a contingency may never happen is evidenced by the history of the leases in question subsequent to the year 1920. It appears from the agreed statement of facts that leases D and K have

been assigned to third persons with the consent of the lessor; that leases E, G, and I have been cancelled and surrendered to the lessor; and the leases N and F have been assigned or released to the lessor. Thus, out of thirteen leases, seven have passed out of the picture without imposing on the plaintiff the obligation to invest any capital. If he had been permitted to retain some part of the net income under the guise of a capital depreciation, he would have merely pocketed an unearned increment.

The departmental construction adopted and applied to the plaintiff's tax returns is in accordance with old regulations. Depreciation has never been allowed except to replace capital investment. The capital invested has always been held to be the cost of the property in respect to which the allowance is made, if the property is acquired since March 1, 1913, and if acquired prior thereto its value as of that date. Apparently these regulations have never been challenged. In numerous cases before the Board of Tax Appeals the law has been so construed and applied. The repeated reenactment by Congress of the same provisions after this department construction was given thereto is the equivalent of an adoption and reenactment of that construction. If the meaning of the law were otherwise doubtful, as we think it is not, this departmental construction and congressional reenactment would be controlling, in accordance with familiar principles. See Trumbull Steel Co. vs. Routzahn, 292 Fed. 1009.

Judgment with costs will be rendered against plaintiff in defendants' favor. An exception may be noted.

D. C. WESTENHAVER, *Judge.*

DECEMBER 9, 1926.

64 In United States District Court

Petition for writ of error

Filed Jan. 29, 1927, in case No. 12,414

Now comes the plaintiff and says that on the 8th day of January, 1927, this court entered a judgment herein in favor of defendant and against plaintiff, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue out of the United States Circuit Court of Appeals from the Sixth Circuit for the correction of errors so complained of and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, and the plaintiff here tenders a bond in such amount as the court may require as security for costs, and prays the allowance of this writ of error.

COMMINS, BROUSE, EGGLESTON & MCDOWELL,
Attorneys for Plaintiff.

In United States District Court

Assignments of error

Filed Jan. 29, 1927, in case No. 12,414

The plaintiff in this cause, in connection with its petition for a writ of error, makes the following assignments of error in the finding and judgment heretofore rendered herein upon the trial of this cause, to wit:

(1) That the finding and judgment herein are contrary to the evidence and the agreed statement of facts herein submitted;

(2) That under the pleadings and agreed statement of facts and of the evidence in the case, the finding and judgment should have been in favor of the plaintiff;

(3) That the court erred in overruling the motion for a new trial filed by the plaintiff;

65 (4) That the finding and judgment are contrary to law; and

(5) For other errors apparent on the record.

COMMINS, BROUSE, EGGLESTON & MCDOWELL,
Attorneys for Plaintiff.

In United States District Court

Order allowing writ of error

Jan. 29, 1927, case No. 12414

This day came the plaintiff, by his attorneys, and filed herein and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof, the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of five hundred dollars, to the approval of this court, which shall operate as security for costs.

[Bond on writ of error, case No. 12414, for $500.00, approved and filed Feb. 5, 1927, omitted in printing.]

67 **In United States District Court**

Writ of error

Filed Feb. 5, 1927, in case No. 12,414

United States Circuit Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the honorable the judge of the District Court of the United States for the Northern District of Ohio, greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is in the said District Court, before you or some of you, between J. Harry Wiener, as plaintiff, and Harry H. Weiss, as collector of internal revenue of the United States, at Cleveland, Ohio, as defendant, a manifest error hath happened, to the great damage of the said J. Harry Wiener, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the * 7th day of March, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 5th day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and of the independence of the United States of America the one hundred and fifty-first.

B. C. MILLER,
Clerk of the District Court of the United States for the Northern District of Ohio.
[SEAL.] By F. J. DENZLER, *Deputy Clerk.*

68 Allowed by:
D. C. WESTENHAVER,
Judge of the District Court.

* Not exceeding 30 days from the day of signing the citation.

Return on writ of error

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

In pursuance to the command of the within writ of error, I, B. C. Miller, clerk of the United States District Court within and for said district, do herewith transmit under the seal of said court a full, true, and complete copy of the record and proceedings of said court in the cause and matter in said writ of error stated, together with all things concerning the same, in accordance with the precipe filed, to the United States Circuit Court of Appeals for the Sixth Circuit.

There is annexed hereto, and made part of this return, the writ of error and citation to said defendant in error.

Witness my official signature and the seal of said court at Cleveland, in said district, this ——— day of ———, A. D. 19—, and in the 15— year of the independence of the United States of America.

———, *Clerk.*
By ———, *Deputy Clerk.*

69 [Citation in usual form, case No. 12414, showing service on Irene Nungesser omitted in printing.]

71 In United States District Court

Stipulation re certification of record

Filed Feb. 5, 1927, in case No. 12414

In accordance with section 7 of Rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law and the rules of the Appellate Court as a true, full, and complete copy of the original pleadings, papers, and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

CUMMINS, BROUSE, EGGLESTON & MCDOWELL,
Attorneys for Plaintiff.

A. E. BERNSTEIN,
U. S. Atty., Attorney for Defendant.

In United States District Court

Precipe for transcript

Filed Feb. 5, 1927, in case No. 12414

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above-entitled cause, and include therein the following papers and orders:

Petition (amended) and precipe.
Answer to amended petition.
Stipulation waiving jury.
Agreed statement of facts.
Memorandum of findings and opinion.
Judgment (journal entry).
Motion for new trial.
72 Order overruling motion for new trial.
Petition for writ of error.
Assignments of error.
Order allowing writ of error.
Bond.
Writ of error.
Return on writ of error.
Citation.
Stipulation in re certification of record.
Precipe.
Defendant's request to court for findings of fact.
Stipulation as to lease of properties.
Stipulation and order that answer be filed as of Dec. 7, 1926.

And deliver all papers to the Gates Legal Publishing Company for printing.

COMMINS, BROUES, ENGLEBECK & MCDOWELL,
Attorneys for Plaintiff.

In United States District Court

Orders extending time for filing transcript of record

In case No. 12414

Date of order		
March 5, 1927.	April 6, 1927.	Westenhaver
April 5, 1927.	April 13, 1927.	Westenhaver.

73 In United States District Court

Petition for writ of error

Filed Jan. 29, 1927, in case No. 12,429

Now comes the plaintiff and says that on the 8th day of January, 1927, this court entered a judgment herein, in favor of defendant and against this plaintiff, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue out of the United States Circuit Court of Appeals from the Sixth Circuit for the correction of errors so complained of and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and the plaintiff here tenders a bond in such amount as the court may require as security for costs, and prays the allowance of this writ of error.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

In United States District Court

Assignments of error

Filed Jan. 29, 1927, in case No. 12,429

The plaintiff in this cause, in connection with its petition for a writ of error, makes the following assignments of error in the finding and judgment heretofore rendered herein upon the trial of this cause, to wit:

(1) That the finding and judgment herein are contrary to the evidence and the agreed statement of facts herein submitted;

74 (2) That under the pleadings and agreed statement of facts and of the evidence of the case the finding and judgment should have been in favor of the plaintiff;

(3) That the court erred in overruling the motion for a new trial filed by the plaintiff;

(4) That the finding and judgment are contrary to law; and

(5) For other errors apparent on the record.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attorneys for Plaintiff.

In United States District Court

Order allowing writ of error

Jan. 29, 1927, case No. 12,429

This day came the plaintiff, by his attorneys, and filed herein and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises. On consideration whereof the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of five hundred dollars, to the approval of this court, which shall operate as security for costs.

75 [Bond on writ of error, case No. 12,429, for $500.00, approved and filed Feb. 5, 1927, omitted in printing.]

77 In United States District Court

Writ of error

Filed Feb. 5, 1927, in case No. 12429

United States Circuit Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States, to the honorable the judge of the District Court of the United States for the Northern District of Ohio, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between J. Harry Wiener, as plaintiff, and C. F. Routzahn, as collector of internal revenue of the United States, at Cleveland, Ohio, also known as the Eighteenth District of Ohio, as defendant, a manifest error hath happened, to the great damage of the said J. Harry Wiener, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the * 7th day of March, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further

* Not exceeding 30 days from the day of signing the citation.

to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 5th day of February, in the year of our Lord one thousand nine hundred and twenty-seven, and of the independence of the United States of America the one hundred and fifty-first.

B. C. MILLER,
Clerk of the District Court of the United States for the Northern District of Ohio.

[SEAL.] By F. J. DENZLER,
Deputy Clerk.

78 Allowed by D. C. Westenhaver, Judge of the District Court.

Return on writ of error

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

In pursuance to the command of the within writ of error, I, B. C. Miller, clerk of the United States District Court within and for said district, do herewith transmit under the seal of said court a full, true, and complete copy of the record and proceedings of said court in the cause and matter in said writ of error stated, together with all things concerning the same, in accordance with the precipe filed, to the United States Circuit Court of Appeals for the Sixth Circuit.

There is annexed hereto and made part of this return the writ of error and citation to said defendant in error.

Witness my official signature and the seal of said court at Cleveland, in said District, this ..... day of ..... A. D. 19.., and in the 15.. year of the Independence of the United States of America.

....., *Clerk.*
By ....., *Deputy Clerk.*

[Citation in usual form, Case No. 12429, showing service on Irene Nungesser, omitted in printing.]

81 In United States District Court

Stipulation re certification of record

Filed Feb. 5, 1927, in case No. 12429

In accordance with section 7 of Rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law and the rules of the Appellate Court as a true, full, and complete copy of the original pleadings, papers, and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the clerk.

CUMMINS, BROUSE, EGGLESTON & MCDOWELL,
Attorneys for Plaintiff.
A. E. BERNSTEIN, *U. S. Attorney,*
Attorney for Defendant.

In United States District Court

Orders extending time for filing transcript of record

In case No. 12429

Date of order	Extension of time	Judge
March 5, 1927.	April 6, 1927.	Westenhaver.
April 5, 1927.	April 13, 1927.	Westenhaver.

82 In United States District Court

Precipe for transcript

Filed Feb. 5, 1927, in case No. 12429

To the CLERK:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

Petition and precipe.
Answer.
Stipulation waiving jury.
Agreed statement of facts (only one filed for both cases).
Memorandum of findings and opinion (only one filed for both cases).
Judgment (journal entry).
Motion for new trial.
Order overruling motion for new trial.
Petition for writ of error.
Assignment of error.
Order allowing writ of error.
Bond.
Writ of error.
Return on writ of error.
Citation.
Stipulation in re certification of record.
Precipe.
Motion by deft. for judgment on record and stipulation of facts.
Stipulation as to lease of properties (only one filed for both cases).
Stipulation and order that answer be filed as of Dec. 7, 1926.

And deliver all papers to the Gates Legal Publishing Company for printing.

COMMINS, BROUSE, ENGLEBRECK & MCDOWELL,
Attorneys for Plaintiff.

83-84 [Clerk's certificate to foregoing transcript omitted in printing.]

85 [Appearances of counsel omitted in printing.]

86 In United States Circuit Court of Appeals, Sixth Circuit

Motion to dismiss, No. 4930

Filed Aug. 23, 1927

And now comes defendant in error and moves the court to dismiss the writ of error filed herein and for cause shows:

First. That it appears that no special findings of fact were made by the District Court in this cause; no request was made by the plaintiff for the court to make special findings of fact; no exceptions were reserved by the plaintiff to the failure of the court to make special findings of fact; no exception was reserved by the plaintiff to the conclusions of law drawn by the court; and neither by motion nor in other manner did the plaintiff present any propositions of law to the court and obtain a ruling on them.

Second. That no demurrer or other pleading of any kind was filed by the plaintiff, raising any question on the pleadings in this cause.

Third. That no question presented by the assignment of errors may be considered by this court.

A. E. BENSTEEN,
U. S. Attorney.
IRENE NUNGESSER,
Asst. U. S. Attorney.

A. W. GREGG,
General Counsel, Bureau of Int. Rev.,
F. W. DEWART,
Special Attorney, Bureau of Int. Rev.,
Of Counsel.

87 In United States Circuit Court of Appeals

Motion to dismiss, No. 4931

Filed Aug. 23, 1927

And now comes defendant in error and moves the court to dismiss the writ of error filed herein and for cause shows:

First. That it appears that no special findings of fact were made by the District Court in this cause; no request was made by the plaintiff for the court to make special findings of fact; no exceptions were reserved by the plaintiff to the failure of the court to make special findings of fact; no exception was reserved by the plaintiff to the conclusions of law drawn by the court; and neither by motion nor in other manner did the plaintiff present any propositions of law to the court and obtain a ruling on them.

Second. That no demurrer or other pleading of any kind was filed by the plaintiff, raising any question on the pleadings in this cause.

Third. That no question presented by the assignment of errors may be considered by this court.

A. E. BERNSTEEN,
U. S. Attorney.
IRENE NUNGESSER,
Asst. U. S. Attorney.

A. W. GREGG,
General Counsel, Bureau of Int. Rev.,
F. W. DEWART,
Special Attorney, Bureau of Int. Rev.,
Of Counsel.

88 In United States Circuit Court of Appeals

Notice of filing of motion to dismiss, No. 4930

Filed Aug. 23, 1927

TO J. HARRY WIENER, PLAINTIFF IN ERROR, AND TO COMMINS, BROUSE, ENGLEBECK, AND McDOWELL, YOUR ATTORNEYS OF RECORD:

Please take notice that I have filed a motion to dismiss the writ of error in this cause, a copy of which is attached to this notice, and that on the ——— day of ———, 1927, or as soon thereafter as counsel can be heard, I will submit the same to the honorable Circuit Court of Appeals at Cincinnati, Ohio, for decision.

A. E. BERNSTEEN,
U. S. Attorney,
IRENE NUNGESSER,
Asst. U. S. Attorney,
Attorneys for Defendant in Error.

A. W. GREGG,
General Counsel, Bureau of Internal Revenue,
F. W. DEWART,
Special Attorney, Bureau of Internal Revenue,
Of Counsel.

The undersigned, attorneys of record for J. H. Wiener, plaintiff in error, herewith acknowledge a copy of the motion to dismiss in the above-entitled action filed by defendant in error and also a copy of the notice which is attached to this acknowledgment of service.

COMMINS, BROUSE, ENGLEBECK & McDOWELL,
Attys. for Plff. in Error.

89 In United States Circuit of Appeals

Notice of filing of motion to dismiss, No. 4931

Filed Aug. 23, 1927

TO J. HARRY WIENER, PLAINTIFF IN ERROR, AND TO COMMINS, BROUSE, ENGLEBECK, AND McDOWELL, YOUR ATTORNEYS OF RECORD:

Please take notice that I have filed a motion to dismiss the writ of error in this cause, a copy of which is attached to this notice, and

that on the ——— day of ———, 1927, or as soon thereafter as counsel can be heard, I will submit the same to the honorable Circuit Court of Appeals at Cincinnati, Ohio, for decision.

A. E. Bernsteen,
U. S. Attorney,
Irene Nungesser,
Asst. U. S. Attorney,
Attorneys for Defendant in Error.

A. W. Gregg,
General Counsel, Bureau of Internal Revenue,
F. W. Dewart,
Special Attorney, Bureau of Internal Revenue,
Of Counsel.

The undersigned, attorneys of record for J. H. Wiener, plaintiff in error, herewith acknowledge a copy of the motion to dismiss in the above-entitled action filed by defendant in error, and also a copy of the notice which is attached to this acknowledgment of service.

Commins, Brouse, Englebeck & McDowell,
Attorneys for Plaintiff in Error.

90 In United States Circuit Court of Appeals

Nos. 4930, 4931

Motion to file brief as amicus curia

Filed Aug. 31, 1927

To the Circuit Court of Appeals for the Sixth Circuit.

The undersigned respectfully move that they be given leave to file the annexed brief, as friends of the court, for the following reasons:

This cause involves the question of the right of a lessee under a long-term lease of real property including buildings (the terms of which lease place the burden of bearing the exhaustion, wear and tear, and obsolescence of said buildings upon the lessee) to claim a deduction from gross income for such exhaustion, wear and tear, and obsolescence under the provisions of the revenue act of 1918, in the process of computing net income for the purposes of taxation under that act.

Similar questions are now pending (for divers taxable years) between the Public Service Corporation of New Jersey and affiliated corporations (for which the undersigned are counsel) and representatives of the United States, in the Bureau of Internal Revenue, involving upwards of $1,000,000 in taxes.

The Commissioner of Internal Revenue declined to rule in favor of said Public Service Corporation of New Jersey by reason of the decision of the District Court in this case, and the decision of this court will undoubtedly be regarded as persuasive or controlling

authority in the Public Service Corporation's proceeding. Therefore the Public Service Corporation, as well as numerous other taxpayers similarly situated, for several of which the undersigned are also of counsel, is vitally interested in the form of the opinion which this court may render in this case and the effect of its decision upon similar, if not identical, situations.

Since the attorneys for the plaintiff in error herein have, in
91 their brief, predicated their argument principally upon the effect, under Ohio law, of the terms of the particular leases under which the plaintiff in error holds title, rather than upon the construction to be given, throughout the United States, to the provisions of the revenue act of 1918 as applied to a situation such as that presented by the facts herein, the undersigned feel that a presentation of the points contained in the annexed brief may be of assistance to the court in deciding the instant case and in rendering a favorable opinion which, if cited as authority, will be fairly applicable in the case of the Public Service Corporation and other similarly situated taxpayers.

Accordingly, the Public Service Corporation has requested the undersigned to file a brief in this case, if the court be agreeable, showing the reasons why they believe that the judgment of the District Court herein should be reversed.

We further respectfully move, if it be permissible under the rules and precedents of this court, that we be granted the privilege of being heard orally at the argument of this cause.

HOLMES, BREWSTER & IVINS,
815 Fifteenth Street, NW.,
Washington, D. C.

E. A. ARMSTRONG,
Public Service Corporation of
New Jersey, Newark, N. J.

AUGUST 15, 1927.

Receipt of a copy of the annexed motion and brief is acknowledged. We hereby consent to the granting of the annexed motion and join in the prayer thereof.

COMMINS, BROUSE, ENGLEBECK & MCDOWELL,
Attorneys for the Plaintiff in Error.

92 In United States Circuit Court of Appeals

Nos. 4930, 4931

Order denying motions to dismiss

Filed Oct. 6, 1927

It appearing that the cases were heard upon agreed statements of fact and that in such case no further finding of facts is essential to the right of review (279 Federal 57, 60):

It is, therefore, ordered that the motions to dismiss be denied.

Leave is granted to file brief of Holmes, Brewster & Ivins and Mr. E. A. Armstrong as amici curiæ. No oral argument is permitted to those appearing only as amici curiæ.

In United States Circuit Court of Appeals

Argument and submission

Nos. 4930, 4931

(January 13, 1928—Before DENISON, MOORMAN, and TUTTLE, JJ.)

These causes are argued together by Mr. Edwin W. Brouse and Mr. James S. Y. Ivins for the plaintiff in error and by Mr. F. W. Dewart, special attorney, Bureau of Internal Revenue, for the defendants in error and are submitted to the court.

In United States Circuit Court of Appeals

Judgment, No. 4930

Filed June 30, 1928

Error to the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this
93 cause be and the same is hereby reversed with costs and the cause remanded for further proceedings consistent with the opinion of this court.

In United States Circuit Court of Appeals

Judgment, No. 4931

Filed June 30, 1928

Error to the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby reversed with costs and the cause remanded for further proceedings consistent with the opinion of this court.

94 In United States Court of Appeals, Sixth Circuit

Nos. 4930-4931

J. HARRY WIENER, PLAINTIFF IN ERROR
vs.
HARRY H. WEISS AND C. F. ROUTZAHN AS COLLECTORS of Internal Revenue, defendants in error

Error to United States District Court, Northern District of Ohio, Eastern Division

Decided June 30, 1928

Opinion

Filed July 11, 1928

Before DENISON and MOORMAN, Circuit Judges, and TUTTLE, District Judge.

MOORMAN, Circuit Judge: Plaintiff in error was engaged in the business of holding property under long-term leases and subletting it for shorter terms for occupancy by or under subtenants. In his income-tax returns for 1918, 1919, and 1920, he claimed allowances for exhaustion, wear, and tear of thirteen buildings held by him under ninety-nine year leases, renewable forever. His claims were disallowed, and after paying the taxes assessed he brought these suits to recover the amounts which he was required to pay on account of the disallowances. The two causes were tried together in the court below upon an agreed statement of facts. (17 Fed. (2d) 650.)

The leases required the lessee to maintain on the premises buildings of the fair cost or value of not less than a stipulated amount (in some cases greater and in none less than the value of the existing buildings), to keep the buildings in "like condition as the same now are in," and in case of their destruction or removal from any
95 cause to replace them with buildings of the fair cost or value of a stated sum (equal to or greater than the value of the existing buildings). In some of the leases there were covenants to erect new buildings at future dates. When these suits were brought, the lessee, however, had invested nothing in new buildings, and the only expenditures that he had made on those that were on the premises when they were leased were for rents and repairs. These expenditures were deducted from his taxable income for the years in which they were made.

It is admitted that there is a natural and normal loss which continuously occurs to a building and which, despite repairs, will in the course of years exhaust it; and it is also admitted that these buildings will be entirely consumed in the lessee's business at least once and perhaps oftener before the leases expire. What the lessee seeks to do is to take care of this exhaustion by establishing an account, free from income taxes, which shall be sufficient to reconstruct the buildings when they shall have been consumed; or, stating it otherwise, he desires to deduct from the annual rental income from each of these buildings that part of the building which was consumed or used in earning this rental income. The Government's position is that this exhaustion should not be allowed because, although reflected in the

lessee's rents or gross income from the building, it does not represent exhaustion, wear, or tear of any capital that he has invested in the building.

We have examined Duffy v. Central R. R. Co., 268 U. S. 55, and other court decisions cited in argument, but do not find that any of them decides the question presented. Nor do we find from the Government's citations, including the regulations issued by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, that the rulings in these cases were made pursuant to any uniform departmental construction which might be said to have received legislative sanction by the passage of subsequent revenue acts. Indeed, there is no decision of the department to which, we feel, there should be given any considerable weight. There are, it is true, expressions in office decision 1014 which might be thought to be applicable, but that ruling must be treated as the department itself treats such rulings—as merely applying to the facts then under consideration.

The revenue act under which these taxes were levied permits the taxpayer, in computing net income, to set aside, tax free, "a reasonable allowance for the exhaustion, wear, and tear of property used in the trade or business, including a reasonable allowance for
96 obsolescence." Comp. St. Sec. 6336 1/8 g. The language of this provision would seem to prescribe but two requisites to the right of a taxpayer to this allowance: One is that the property shall have been used in his business, and the other that he is the one who must suffer and bear the burden of the loss or depreciation. This also seems true from the further point of view that the purpose of the revenue act is to tax only gain, and the amount thus allowed to be set aside is not gain, but is capital which has gone into gross income. United States v. Ludey, 274 U. S. 295. Whether it is the capital of the one who has used the property in his business or of some one else depends, of course, upon the environal facts. It is not necessarily the capital of the holder of the legal title, who, as in this case, may be protected by the undertakings of the lessee; nor is it the capital of the mere user of the property, who may be under no obligation to make restitution. It is, it seems to us, the capital of the one who is responsible for the property—the owner or the person responsible to the owner for it—and who also uses and consumes it in his business; and that means, of course, that one may not have the legal title, or may not have paid anything for the property, and still have the right to this capital deduction, since he may have an equitable interest as valuable as the property itself, or may be so obligated to the holder of the legal title to maintain or restore the property that the investment becomes his own. This is the situation of the lessee in these cases. He is responsible for the buildings, must keep them in the condition in which they were when he took the leases, and if they are consumed, as they will be in his business, or are destroyed or removed, he must replace them. For every practical purpose they are his buildings, and in our opinion they are his capital so far as they are consumed in his business.

The Government contends that to permit the lessee to take this depreciation would be to enable him to accumulate a capital investment, tax free. This, we think, is a misapprehension, because if the leases should be surrendered or cancelled when the buildings first become exhausted, the depreciation fund would be consumed in restoring them, or if they should be surrendered at some later period, when the buildings had once been replaced but had not again become exhausted, the accumulation again would be required to restore them from their partially exhausted condition. There would never, therefore, be an accumulation of capital but only a return of capital as it was exhausted. If, on the other hand, the
97 depreciation should not be allowed and the leases should be surrendered or cancelled when the buildings are exhausted, the lessee would be required to replace the buildings from rentals upon which he had paid income taxes, the effect of which would be to require him to pay taxes upon capital. We think he is entitled to the allowance.

Judgment reversed.

98 In United States Circuit Court of Appeals

Motion to stay mandate, Nos. 4930, 4931

Filed July 28, 1928

Come now the defendants herein and move the court to stay the mandate in the above-entitled cases for a period of 90 days after date when the printed opinion of the court was filed.

The defendants and the United States Government request the additional time in order to determine if the Government will apply for a writ of certiorari in these cases, and, if it decides that a writ should be applied for, to give time in which it can be done.

The peculiar circumstances of these cases and the interests of justice require this stay, because the question if writ of certiorari must be asked for, must be determined by the Government officials at Washington, and under the required procedure it must pass through a number of hands before it is finally determined. The further fact that this is the vacation period and a number of officials and their associates are away on their vacation so that it takes much longer than usual in order to have a matter of this kind determined.

The defendants and the representatives of the United States Government will expedite the matter as much as can be, and if it should be determined that the writ of certiorari will not be requested the defendants will at once notify the court so that the mandate may issue without further delay.

A. E. BERNSTEEN,
United States Attorney, Attorney for Defendants.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,

FREDERICK W. DEWART,
Special Attorney, Bureau of Internal Revenue,
Of Counsel.

99 In United States Circuit Court of Appeals for the Sixth Circuit

Clerk's certificate

I, Carl W. Reuss, deputy clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the cases of J. Harry Wiener vs. Harry H. Weiss, No. 4930, J. Harry Wiener vs. C. F. Routzahn, No. 4931, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this thirteenth day of September, A. D. 1928.

CARL W. REUSS,
Deputy Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

100 Supreme Court of the United States

No. 482

Order allowing certiorari

Filed October 29, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

101 Supreme Court of the United States

No. 483

Order allowing certiorari

Filed October 29, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] File No. 33,791, 33,792. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 482. Harry H. Weiss, collector of internal revenue, petitioner, v. J. Harry Wiener. Term No. 483. C. F. Routzahn, collector of internal revenue, petitioner, v. J. Harry Wiener. Petition for writs of certiorari and exhibit thereto. Filed September 28th, 1928. File Nos. 33,791, 33,792.